

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Arizona.

FILED

OCT - 1 1941

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,
Appellant,

VS.

LOIS ROGERS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in

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ROLL OF ATTORNEYS

Messrs. ELLINWOOD and ROSS,
Title and Trust Building,
Phoenix, Arizona,
Attorneys for Appellant.

Messrs. DOUGHERTY and CHANDLER,
JOHN F. CONNOR, Esquire,
Heard Building,
Phoenix, Arizona,
Attorneys for Appellee. [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Arizona
in and for the County of Maricopa

No. 48903

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, and for her cause of action against the defendant complains and alleges:

I.

That the plaintiff is a resident of Maricopa County, State of Arizona, and that the defendant is a foreign corporation duly organized and existing under the laws of the State of New York for the purposes of conducting and engaging in the life insurance business, and as such foreign corporation is authorized and licensed to do business within the State of Arizona.

II.

That on December 7, 1939, Zeno A. Rogers, now deceased, made application to the defendant herein for a life insurance policy for the face amount of Two Thousand (\$2,000.00) Dollars with the added feature of double the face of said policy in the event that the insured should suffer death resulting

directly and independently of all other causes from bodily injuries, effected solely through external, violent and accidental causes.

That said applicant was examined on the same day, and thereafter the said defendant, by and through its agents, delivered to Zeno A. Rogers, the applicant, policy #17-507-735, together with the application of the said Zeno A. Rogers, thereto attached. [3]

III.

That on January 26, 1940, the said Zeno A. Rogers was in an automobile accident and as a result thereof received injuries, and died on January 28, 1940, as a result of said accident; that said Zeno A. Rogers died within the State of Arizona and that his death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental causes, and that such death occurred within sixty (60) days after the sustaining of such injuries.

IV.

That the said Zeno A. Rogers, in the making of said application for insurance and receiving delivery of the same from said defendant, paid the premium required by the company and duly performed all the conditions and agreements of said policy of insurance on his part to be performed, and that the said Zeno A. Rogers was in possession of the policy at the time of his death.

V.

That prior to the beginning of this action, defendant waived the provisions of said policy regarding proofs of loss, and estopped itself from demanding the submission of said proofs of loss, by its repudiation of the aforesaid policy of insurance and its denial of liability under the terms thereof.

VI.

That the plaintiff herein was the wife of the said deceased, and as said wife had an insurable interest in the life of said deceased and was specifically named in said policy as beneficiary of the insured; that the plaintiff has made demand upon the company for the payment of the death benefits under said policy; that said defendant has failed to pay, and has refused to pay, said amount. [4]

VII.

That the plaintiff herein is entitled to recover the sum of Two Thousand (\$2,000.00) Dollars, the face value of said policy, and the additional sum of Two Thousand (\$2,000.00) Dollars, being double the face value of this policy for the accidental death of the said insured, which death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental causes within sixty (60) days after the sustaining of such injuries.

Wherefore, plaintiff prays judgment against the defendant for the sum of Four Thousand (\$4,000.-00) Dollars and for her costs herein incurred.

JOHN FRANCIS CONNOR

Luhrs Tower,
Phoenix, Arizona.

C. H. YOUNG

209 Luhrs Building,
Phoenix, Arizona.

Attorneys for Plaintiff.

Received copy this day of July, 1940.

[Endorsed]: No. 48903 Filed: Walter S. Wilson,
Clerk 10:59 A. M. By M. Michael, Deputy Jul. 5,
1940. [5]

In the Superior Court of the State of Arizona
in and for the County of Maricopa

No. 48903-Div. 2

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation,

Defendant.

SUMMONS

The State of Arizona to the above named defendant New York Life Insurance Company, a corporation,

You are hereby summoned and required to appear and defend in the above entitled action in the above entitled court, within twenty days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, or within thirty days, exclusive of the day of service, if served without the State of Arizona, and you are hereby notified that in case you fail so to do, judgment by default will be rendered against you for the relief demanded in the complaint.

The name and address of plaintiff's attorney is John Francis Connor, Luhrs Tower, Phoenix, Arizona, and C. H. Young, 209 Luhrs Building, Phoenix, Arizona.

Given under my hand and the seal of the Superior Court of the State of Arizona in and for the County of Maricopa, this 5th day of July, 1940.

(Court Seal) WALTER S. WILSON

Clerk

By M. MICHAEL

Deputy Clerk [6]

I hereby certify that I received the within Summons on the 5th day of July, A. D. 1940, at the hour of 11:55 A.M., and personally served the same on the 5th day of July, A. D. 1940 on New York Life Insurance Company, a corporation, being defendant named in said Summons, by delivering to Wilson T. Wright, in person, as a member of the Corporation Commission of the State of Arizona in the County of Maricopa, 2 copies of said Summons to which

was attached a true copy of the Complaint mentioned in said Summons.

Dated this 5th day of July, A. D. 1940.

LON JORDAN

Sheriff

G. C. SCHOONOVER

Deputy Sheriff

Fees—Service\$1.50

No. of miles traveled one way30

Total\$1.80

[Endorsed]: No: 48903 Filed: Walter S. Wilson,
Clerk 4:10 P.M. By M. Michael, Deputy Jul. 6,
1940. [7]

In the Superior Court of the State of Arizona
in and for the County of Maricopa

No. 48903—Div. #2

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation,

Defendant.

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

To the Honorable Superior Court of the State of
Arizona, in and for the County of Maricopa:

The petition of New York Life Insurance Company, a corporation, defendant in the above-entitled cause, respectfully shows to this Court:

I.

The above-entitled suit has been brought in this Court and is now pending therein.

II.

Said action is of a civil nature at law and is brought to recover from defendant the sum of \$4,000.00 as damages for the alleged breach of a certain contract of insurance alleged to have been entered into between defendant and plaintiff.

III.

The above entitled action involves a controversy which is wholly between citizens of different states, to-wit: [8] Your petitioner, New York Life Insurance Company, was at the time this suit was commenced, and still is, a foreign corporation created and existing under the laws of the State of New York, and was then, and still is, a resident and citizen of said State of New York and a non-resident of the State of Arizona. Plaintiff, Lois Rogers, was then, and still is, a citizen and resident of the State of Arizona.

IV.

Said action is one of which the District Courts of the United States are given original jurisdiction.

V.

The time within which your petitioner is required by the laws of the State and the rules of this Court to answer or plead to the complaint in the above-entitled action has not yet expired.

VI.

The amount in controversy in said action exceeds \$3,000.00, exclusive of interest and costs, as appears from the allegations of plaintiff's complaint.

VII.

Petitioner presents herewith a bond conditioned that it will enter in the District Court of the United States for the District of Arizona, within 30 days from the date of filing this petition, a certified copy of the record of this suit, and that it will pay all costs that may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto. [9]

VIII.

Prior to the filing of this petition and of said bond for the removal of this cause, written notice of intention to file the same was given by petitioner to the plaintiff as required by law, a true copy of which said proof of service of the same is hereto attached.

Wherefore, petitioner prays that this Court proceed no further herein except to make an order for removal as required by law, and to accept said bond

and cause the record herein to be removed into said District Court of the United States for the District of Arizona according to the statute in such cases made and provided.

ELLINWOOD & ROSS

WILLIAM A. EVANS

EVERETT M. ROSS

Attorneys for Defendant

807 Title & Trust Bldg.

Phoenix, Arizona

State of Arizona,
County of Maricopa—ss.

Everett M. Ross, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the same is true and correct of his own knowledge except as to matters which are therein stated upon information and belief, and, as to those matters, he believes it to be true; [10] and that he makes this affidavit for and on behalf of said defendant for the reason that he is familiar with the facts and for the further reason that the petitioner is a foreign corporation, to-wit, a corporation of the State of New York, and that there are no officers of petitioner within the jurisdiction who are capable of verifying the petition.

EVERETT M. ROSS

Subscribed and sworn to before me this 20th day of July, 1940.

[Seal]

LUCILLE HILL

Notary Public

My commission expires: 3/17/41.

[Endorsed]: No: 48903 Filed: Walter S. Wilson,
Clerk 10:10 A. M. By M. S. Grau, Deputy Jul. 20,
1940. [11]

In the Superior Court of the State of Arizona
in and for the County of Maricopa

No. 48903, Div. #2

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation,

Defendant.

AFFIDAVIT OF SERVICE OF NOTICE OF
FILING AND HEARING PETITION FOR
REMOVAL AND FILING AND APPROV-
ING BOND ON REMOVAL

State of Arizona,
County of Maricopa—ss.

Everett M. Ross being first duly sworn upon his
oath deposes and says that the instrument attached
hereto is a true and correct copy of the Notice

which has been served upon Lois Rogers, plaintiff in the above-entitled cause and upon Charles H. Young and John Francis Connor, attorneys for said plaintiff, together with a true and correct copy of the Petition for Removal and Bond on Removal, as attached to said Notice, and that he personally served said instruments upon said plaintiff and her attorneys by leaving copies of the same at the place of business of said Charles H. Young in the Luhrs Building, Phoenix, Arizona, and at the place of business of said John Francis Connor in the Luhrs Tower, Phoenix, Arizona.

The service of said Notice and copies of the Petition and Bond were made at the hour of 10 o'clock A. M. on the 20th day of July, 1940.

EVERETT M. ROSS [12]

Subscribed and sworn to before me this 22nd day of July, 1940.

My commission expires: 3/17/41.

[Notarial Seal] LUCILLE HILL

Notary Public

[Endorsed]: No: 48903 Filed Walter S. Wilson, Clerk 9:25 A. M. By Ernest R. Morris, Deputy Jul. 20, 1940. [13]

In the Superior Court of the State of Arizona
in and for the County of Maricopa

No. 48903—Div. #2

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation,

Defendant.

NOTICE OF FILING AND HEARING PETI-
TION FOR REMOVAL AND FILING AND
APPROVING BOND ON REMOVAL

To the above-named Lois Rogers, plaintiff, and to
Charles H. Young, her attorney:

Please take notice that New York Life Insurance Company, the defendant in the above-entitled cause, will, on the 20th day of July, 1940, at 9:30 o'clock A. M., file in the office of the Clerk of the Superior Court of the State of Arizona, in and for the County of Maricopa, its petition, a copy of which accompanies this notice, for the removal of said cause to the District Court of the United States, in and for the District of Arizona, and that the defendant, New York Life Insurance Company, will also, then and there, file a bond with said Clerk, a copy of which also accompanies this notice, and at the hour of 10 o'clock A. M., on the 20 day of July, 1940, or as soon thereafter as counsel may

be heard, said defendant will request said Superior Court to accept said petition and to accept and approve said bond and to cause a certified copy of the record in said cause to be [14] removed unto the said District Court of the United States, in and for the District of Arizona.

Dated this 20 day of July, 1940.

ELLINWOOD & ROSS

WILLIAM A. EVANS

E. M. R

EVERETT M. ROSS

Attorneys for Defendant

807 Title & Trust Bldg.

Phoenix, Arizona

[Endorsed]: No. 48903. Filed: Walter S. Wilson, Clerk. 10:10 A. M. By M. S. Grau, Deputy. July. 20, 1940. [15]

In the Superior Court of the State of Arizona
In and for the County of Maricopa
No. 48903, Div. #2

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Defendant.

BOND FOR REMOVAL

Know All Men By These Presents:

That we, New York Life Insurance Company, a corporation, as principal, and Hartford Accident & Indemnity Company, a corporation, duly authorized to engage in a general indemnity and surety business in the State of Arizona, as Surety, are held and firmly bound unto Lois Rogers, her heirs, legal representatives, and assigns in the penal sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

The conditions of this obligation are such that, whereas, the said, New York Life Insurance Company, a corporation, has applied by petition to the Superior Court of the State of Arizona, in and for the County of Maricopa, for the removal of the

above-entitled cause from the Superior Court to the District Court of the United States, for the District of Arizona; [16]

Now, if the said New York Life Insurance Company, a corporation, shall enter in the said District Court of the United States for the District of Arizona, within thirty days from the date of filing of the petition for such removal, a certified copy of the record in said suit, and shall well and truly pay all the costs that may be awarded by said District Court if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

NEW YORK LIFE INSURANCE
COMPANY, a corporation

By EVERETT M. ROSS

Its Attorney

Principal

HARTFORD ACCIDENT & IN-
DEMNITY COMPANY, a corpo-
ration

By C. G. SULLIVAN

Its Attorney-in-Fact

[Endorsed]: No. 48903. Filed: Walter S. Wilson, Clerk. 10:10 A. M. By M. S. Grau, Deputy. Jul. 20, 1940. [17]

In the Superior Court of the State of Arizona
in and for the County of Maricopa

No. 48903—Div. #2

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

ORDER FOR REMOVAL

This cause coming on for hearing upon petition and bond of the defendant, New York Life Insurance Company, a corporation, for the removal of this cause to the District Court of the United States, in and for the District of Arizona, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law and has made and filed a bond duly conditioned, with good and sufficient sureties as provided by law, and has given plaintiff due and legal notice thereof, and it further appearing to the court that this is a proper cause for removal to said District Court,

It is therefore ordered by the Court that said petition and bond be, and they are hereby, accepted, and that this cause be, and it is hereby, removed to the District Court of the United States, in and for the District of Arizona, and that the Clerk of this Court be, and he is hereby, directed to prepare a

certified copy of the record in said cause to be filed in the District Court as required by law.

Done in open court this 20 day of July, 1940.

M. T. PHELPS

Judge

[Endorsed]: No. 48903. Filed: Walter S. Wilson, Clerk. 10:10 A.M. By M. S. Grau, Deputy. Jul. 20, 1940. [18]

[Endorsed]: Record on Removal. Filed Aug. 19, 1940. Edward W. Scruggs, Clerk. United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [19]

In the District Court of the United States
in and for the District of Arizona

No. Civil 146—Phoenix

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Defendant.

AMENDED COMPLAINT

Comes now the plaintiff and for her cause of action against the defendant complains and alleges:

I.

That the plaintiff is a resident of Maricopa County, State of Arizona, and that the defendant,

New York Life Insurance Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and now is, and at all times mentioned herein, was duly qualified to do business in the State of Arizona, and to solicit, sell and issue life insurance and life insurance policies therein.

II.

That on December 7, 1939, Zeno A. Rogers, now deceased, made application to the defendant herein for life insurance and a life insurance policy upon his life for the face amount of Two Thousand (\$2000.00) Dollars, with double indemnity features in the event of his accidental death, and with the plaintiff, Lois Rogers, named as beneficiary thereunder, or in the event of her prior death, to Gale A. Rogers and Russel L. Rogers, sons of the insured, share and share alike, or to the survivor.

That said applicant was examined on the same day, and thereafter the said defendant, New York Life Insurance Company, by and through its agents, delivered to Zeno A. Rogers, the applicant, its New York Life Insurance policy #17-507-735, together with the application of said Zeno A. Rogers and his [20] answers to the medical examiner thereto attached.

III.

That on January 26, 1940, the said Zeno A. Rogers was in an automobile accident and as a consequence thereof received injuries, and died on

January 28, 1940, as a result of said accident; that said Zeno A. Rogers died within the State of Arizona and that his death resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes, and that such death occurred within sixty days after the sustaining of such injuries.

IV.

That the said Zeno A. Rogers paid the premium for such policy of insurance, and in the making of said application for insurance and receiving delivery of the same from the defendant, New York Life Insurance Company, duly performed all the conditions and agreements of said policy of insurance on his part, and defendant accepted performance thereof, and delivered the policy, and that the said Zeno A. Rogers was in possession of the policy at the time of his death.

V.

That prior to the beginning of this action defendant waived the provisions of said policy regarding proofs of death and proofs of loss, and estopped itself from demanding the submission of said proofs of death and proofs of loss by its repudiation of the aforesaid policy of insurance and by its denial of liability under the terms thereof, and its refusal and failure to furnish or supply plaintiff with the forms of said proof.

VI.

That long prior to the 7th day of December, 1939, and up to and including the 28th day of January, 1940, Zeno A. Rogers, deceased, and plaintiff, Lois Rogers, were husband and wife; [21] that plaintiff as said wife had an insurable interest in the life of said deceased and was specifically named in said policy as beneficiary of the insured.

That the plaintiff has made demand upon the said defendant company for the payment of the death benefits under said policy; that said defendant has failed to pay, and has refused and refuses to pay the said benefits and amounts due.

VII.

That the plaintiff herein is entitled to recover the sum of Two Thousand (\$2000.00) Dollars, the face value of said policy, and the additional sum of Two Thousand (\$2000.00) Dollars being double the amount of the face value of said policy for the accidental death of the insured, which death resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes within sixty days after the sustaining of such injuries.

Wherefore, plaintiff prays judgment against the

defendant for the sum of Four Thousand (\$4000.00) Dollars and for her costs herein incurred.

JOHN FRANCIS CONNOR

626 Heard Building,
Phoenix, Arizona.

C. H. YOUNG

209 Luhrs Building,
Phoenix, Arizona.

Attorneys for Plaintiff

Received copy of the foregoing amended complaint this 3rd day of December, 1940.

ELLINWOOD & ROSS

Attorneys for Defendant

[Endorsed]: Filed Dec. 3, 1940. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen. J. Ballard, Deputy Clerk. [22]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S

AMENDED COMPLAINT

Comes now the defendant and for answer to plaintiff's Amended Complaint admits, denies and alleges as follows:

I.

Admits all of the allegations contained in Paragraphs I, II, III and VI of Plaintiff's Amended Complaint, except the allegation contained in Paragraph II thereof that defendant delivered to Zeno

A. Rogers its insurance policy No. 17507735 together with the application and his answers to the medical examiner. Said allegation defendant expressly denies.

II.

Denies all of the allegations contained in Paragraph IV of Plaintiff's Amended Complaint except the allegation that the policy referred to therein was in the possession of Zeno A. Rogers at the time of his death.

III.

Denies all of the allegations contained in Paragraphs V and VII of Plaintiff's Amended Complaint.

IV.

Alleges that on December 7, 1939, Zeno A. Rogers made an application to defendant for a policy of insurance in the amount of \$2,000 on the Ordinary Life Plan with disability and double indemnity benefits; that said application provided, among [23] other things, that the insurance applied for should not go into force unless and until the policy was delivered to and received by the applicant and the first premium thereon paid in full during his lifetime; that on December 19, 1939, the Head Office of defendant, located in New York, N. Y., issued its policy No. 17-507-735 on the life of Zeno A. Rogers in the amount of \$2,000, with disability and double indemnity benefits on the Ordinary Life Plan; that said policy was not issued as applied for in the aforesaid application; that the said policy

differed from the policy applied for in that defendant endorsed thereon a rider clause modifying its liability in the event of the death of the insured while riding in or operating an aircraft; that the Head Office of defendant mailed said policy to the Arizona Branch Office of defendant on December 19, 1939, with the instruction that it was not to be delivered to Zeno A. Rogers until the first semi-annual premium thereon, in the sum of \$40.50, was paid and said applicant had signed an agreement accepting the policy as modified by the aforesaid aviation endorsement; that on December 29, 1939, said policy was, through inadvertence and mistake, and contrary to the aforesaid instruction, forwarded to Zeno A. Rogers by mail without defendant's first having collected the initial premium thereon and without having obtained the signature of said Zeno A. Rogers to the agreement accepting the policy as modified by the aviation endorsement thereon; that defendant notified Zeno A. Rogers that the aforesaid policy had been forwarded to him in error and requested him to return said policy to defendant until the first premium was paid; that Zeno A. Rogers did not return the aforesaid policy to defendant and did not pay the said premium and did not execute the agreement accepting the policy as modified. [24]

Wherefore, defendant prays that plaintiff take nothing by her Amended Complaint and that de-

fendant recover its costs expended and incurred herein.

ELLINWOOD & ROSS
JOS. S. JENCKES, JR.
EVERETT M. ROSS

Attorneys for Defendant
807 Title & Trust Bldg.
Phoenix, Arizona

State of Arizona,
County of Maricopa—ss.

David F. Caskey, being first duly sworn on oath, deposes and says: That he is Cashier of the Arizona Branch Office of New York Life Insurance Company, a corporation, defendant in the above action, and that as such Cashier he is duly authorized to make this verification for and on behalf of said defendant; that he has read the foregoing Answer and knows the contents thereof and that the same is true in substance and effect.

DAVID F. CASKEY

Subscribed and sworn to before me this 12th day of December, 1940.

[Seal]

LUCILLE HILL
Notary Public

My commission expires: 3/17/41.

[Endorsed]: Filed Dec. 12, 1940. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen. J. Ballard, Deputy Clerk. [25]

[Title of District Court.]

October 1940 Term

At Phoenix

MINUTE ENTRY OF
MONDAY, MARCH 10, 1941
(Phoenix Division)

Honorable Dave W. Ling, United States Judge,
Presiding.

[Title of Cause.]

Plaintiff's Motion to Set comes on regularly for hearing this day.

John Francis Connor, Esquire, appears as counsel for plaintiff and Everett Ross, Esquire, appears as counsel for the defendant.

It is ordered that this case be set for trial April 22, 1941, at ten o'clock a. m. [26]

[Title of District Court and Cause.]

INSTRUCTIONS FOR JURY
INSTRUCTIONS FOR JURY REQUESTED
BY PLAINTIFF [27]

I.

You are instructed, that if you believe from the evidence that prior to and up to and including the date of delivery of the life insurance policy sued on herein, the New York Life Insurance Company voluntarily and knowingly held Arthur F. Lindberg David F. Caskey out to the world as its Agency

Director for the State of Arizona, and as authorized to supervise, direct and control the said company's life insurance business within said State of Arizona, and to permit, authorize or direct the delivery of life insurance policies similar to the one herein involved without the pre-payment of the first premium, or any premium thereon, and had so conducted itself in this regard, as to reasonably justify the public generally, and those dealing with it, in believing that the said Arthur F. Lindberg was authorized, permitted or directed to deliver, permit or cause to be delivered similar policies, and that the policy herein involved was received and accepted by the said Zeno A. Rogers, believing that the said Arthur F. Lindberg had authority to so deliver said policy without the pre-payment of premium, then the New York Life Insurance Company, in the absence of some reason or cause deemed sufficient in law, would be bound by the acts of the said Arthur F. Lindberg.

Branson Inst. To Juries 182;

Fore v. Hitson, 8 S. W. 292

Smith v. Wise, 58 Ill. 141;

Haskell v. Starbird, 25 N. E. 14.

Given.

DAVE W. LING [28]

II.

You are instructed that either by contract or by operation of law, the said Arthur F. Lindberg, as Agency Director, the said David F. Caskey, as Agency Cashier for the State of Arizona; and/or

any other persons employed in said Agency office, charged with the duty of handling, controlling, mailing or delivery of insurance policies within the scope of their employment, are regarded as agents of the defendant company; and you are further instructed that such persons as agents could bind the defendant company within the limits of the authority with which they, or any of them, apparently were clothed, in respect to the subject matter of his agency, and for the protection of innocent third persons.

The authority of an agent is enlarged by implication when the principal permits the agent to do acts not expressly authorized, and if, through inattention or otherwise, the defendant company suffered its agents, or any of them, to act beyond his, or their, authority without objection, then the company, in the absence of some reason or cause deemed sufficient in law, is bound to those who were not aware of any want of authority, to the same extent as if the requisite power had been directly conferred.

* * * * *

Branson Inst. to Juries 182;

Hanover Nat'l Bank v. Amer. Dock Co., 43
N. E. 72, 51 Amer. State 721;

Ins. Co. v. Norton, 96 U. S. 234;

Manufacturers etc. Co. v. Armstrong, 45 Ill.
App. 217;

U. S. Life Ins. Co. v. Lesser, 28 So. Reps.
646.

Given.

DAVE W. LING [29]

III.

You are instructed, that if you find from the evidence that the policy sued on herein was mailed to, and received by the said Zeno A. Rogers previous to the time of his death, or that said policy was found among the papers of the said Zeno A. Rogers after his death, and that said policy acknowledged the payment of the first premium, then such delivery, possession and acknowledgment constitute *prima facie* evidence of a binding contract of insurance, and the burden of proof falls upon the defendant company to establish, by evidence, some reason regarded by the law as good and sufficient, why the plaintiff should not recover judgment in this action.

Abbott Tr. Ev. Vol. 2. 1242.

Page v. Virginia Life Ins. Co. 42 SE 543

Rayburn v. Pa. Cas. Co. 50 SE 762, 107 Am.
St. Rep. 548

Home Ins. Co. v. Gilman et al 112 Ind. 7

De Frece v. Nat'l Life Ins. Co. 32 NE 556

Pointer v. Ind. Life et al 30 NE 876

Michigan Mut. Life Ins. Co. v. Custer 128
Ind. 255, 46 At. 1005

Mauck v. Merchants etc. 54 At. 952

Washburn v. Union Cent. Life Ins. Co. 30 So.
Reps. 1011

Given.

DAVE W. LING. [30]

IV.

You are instructed, that the application for life insurance policy signed by Zeno A. Rogers and said life insurance policy issued in connection therewith are to be construed together, and if you find from the evidence that the said Zeno A. Rogers, in his executed application, waived all benefits of his insurance policy in case of an accident in connection with aircraft, then you are instructed that the signature of Zeno A. Rogers to the so-called permanent aviation clause proposed for his further signature, was not essential to constitute an enforceable life insurance contract; and if you find all other necessary facts in favor of the plaintiff, you are instructed that the plaintiff is entitled to recover in this action, notwithstanding any such failure, if such you find, on the part of Zeno A. Rogers to sign said permanent aviation clause previously to the delivery to him of said insurance policy.

Given.

DAVE W. LING. [31]

VI.

You are instructed that if you find from the evidence that at any time previous to the death of Zeno A. Rogers, the Defendant acting in this behalf by its proper authorized officers agreed expressly or by implication that Zeno A. Rogers might pay the first premium due on the policy herein involved,

out of his commissions or future earnings, then you are further instructed that such an agreement could not be rescinded or terminated by the Defendant after the death of the said Zeno A. Rogers without the consent of Mrs. Rogers, the beneficiary, named in the policy.

Given.

DAVE W. LING.

[Endorsed]: Filed Apr 23 1941 Edward W. Scruggs, Clerk, United States District Court for the District of Arizona By Gwen J. Ballard, Deputy Clerk. [32]

[Title of District Court and Cause.]

Defendant's Requested Instruction No. 1

The Court instructs you that an insurance policy may be issued and signed by the defendant company and still be inoperative for want of delivery, for the application signed by Rogers provided that the insurance should not go into effect unless and until the policy was delivered. The question of delivery is always one of intention. Consequently, if you find that the defendant company forwarded the policy to Zeno A. Rogers by mistake and without the intention of parting with possession of it; then there was no delivery of the policy and your verdict must be for defendant.

29 Am. Jur. p. 164

Given.

DAVE W. LING. [33]

[Title of District Court and Cause.]

Defendant's Requested Instruction No. 2

It is provided in the application which Zeno A. Rogers made for the insurance policy in question that the insurance applied for should not go into effect until the first premium was paid in full during the insured's lifetime. The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence that Zeno A. Rogers paid the first premium to defendant. Then your verdict must be for the defendant unless you find that credit for said premium was extended to Zeno A. Rogers by Lindberg while acting within the scope of his employment.

Curtis v. Prudential Ins. Co. (C.C.A.4th,
1932) 55 Fed. (2d) 97

Given:

DAVE W. LING.

[Endorsed]: Filed Apr 23 1941 Edward W. Scruggs, Clerk United States District Court for the District of Arizona By Gwen J. Ballard, Deputy Clerk. [34]

[Title of District Court.]

April 1941 Term

At Phoenix

MINUTE ENTRY OF
WEDNESDAY, APRIL 23, 1941
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding

[Title of Cause.]

The Jury, and all members thereof, the parties
and counsel are present pursuant to recess, and fur-
ther proceedings of trial are had as follows:

Rebuttal Continued:

Stanley Clem is now sworn and examined on be-
half of the plaintiff.

Plaintiff's Exhibit 5, Letter dated October 30,
1939, from Z. A. Rogers to the New York Life In-
surance Co., is now admitted in evidence.

The plaintiff, Lois Rogers, heretofore sworn, is
now recalled and further examined in her own be-
half.

Gail Rogers, heretofore sworn, is now called and
examined on behalf of the plaintiff.

The plaintiff, Lois Rogers, heretofore sworn, is
now recalled and further examined in her own be-
half.

Thereupon, the Plaintiff rests.

Surrebuttal:

Arthur F. Lindberg, heretofore sworn, is now
recalled and further examined on behalf of the
defendant.

And the Defendant rests.

Both sides rest.

Thereupon, at the hour of 11:25 o'clock a.m., the Jury, being first duly admonished by the Court, is excluded from the Courtroom.

Counsel for the defendant now moves for a directed verdict on the grounds that there has been no evidence that any premium has been paid on the policy in question or that there was any waiver of a premium; that there is [35] no evidence that the policy was delivered; and that it has been shown by the evidence that there is no authority on the part of Mr. Lindberg, or any other agent in Arizona, to waive the payment in cash or the premium due on this policy, and also Mr. Rogers was advised of the limitations of the Agents' authority.

Whereupon, the Jury and all members thereof return into open Court at the hour of 11:45 o'clock a. m., and

It is ordered that said motion for a directed verdict be and it is denied.

And thereupon, at the hour of 11:46 o'clock a. m., it is ordered that the further trial of this case be continued to the hour of 2:15 o'clock p.m., to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of 2:15 o'clock p.m., the Jury and all members thereof, the parties and respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

All the evidence being in, the case is argued by

respective counsel to the Jury. Whereupon, the Court duly instructs the Jury and said Jury retire at the hour of 3:35 o'clock p.m., in charge of a sworn bailiff to consider of their verdict.

Subsequently, the parties and counsel being present, the Jury return in a body into open Court at the hour of 5:40 o'clock p.m., and all members thereof being present, through their foreman request that the Court's instructions be read to them, and such instructions are now read to the Jury by Louis L. Billar, reporter, and said Jury retire at the hour of 5:50 o'clock p.m., in charge of a sworn bailiff to further consider of their verdict.

Subsequently, the parties and counsel being present, the Jury return in a body into open Court at the hour of 6:00 o'clock p.m., and all [36] members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to-wit:

CIV-146 Phoenix

“LOIS ROGERS

Plaintiff

Against

NEW YORK LIFE INSURANCE

COMPANY, a corporation

Defendant

VERDICT

We, the Jury, duly empaneled and sworn
in the above entitled action, upon our
oaths, do find for the plaintiff.

HARRY H. DAVIS,

Foreman.”

The verdict is read as recorded and the Jury is
discharged from the further consideration of this
case and excused until Thursday, May 1, 1941, at
ten o'clock a.m. [37]

In the District Court of the United States
For the District of Arizona

No. Civil 146—Phoenix

LOIS ROGERS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE
COMPANY, a Corporation,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 22nd day of April, before the Honorable Dave W. Ling, presiding with a jury, the plaintiff appearing in person and by her attorneys, Dougherty and Chandler, and John Francis Connor, and the defendant appearing by Arthur F. Lindberg, Agency Director, of the Arizona Branch office for defendant, and its attorneys Everett M. Ross and Joseph S. Jenckes, Jr., of Ellinwood and Ross; a jury was duly empaneled and sworn to well and truly try the issues in said cause; the taking of testimony was thereupon commenced and concluded on the 23rd day of April, 1941, whereupon both sides rested.

The defendant then moved the Court to instruct a verdict in its favor and the said motion was duly argued, submitted and denied. The cause was orally argued before the jury by counsel for the respective parties and thereafter the Court duly in-

structed the jury as to the law and the jury then retired to deliberate on its verdict and on the same date did return into [59] open Court its verdict in said cause as follows:

“We the jury, duly empaneled and sworn in the above entitled action, upon our oaths do find for the plaintiff

HARRY H. DAVIS

Foreman

It is therefore, ordered, adjudged and decreed, that the plaintiff Lois Rogers, do have and recover judgment of and from the defendant, New York Life Insurance Company, a Corporation, in the sum of Four Thousand (\$4,000.00) Dollars, with interest thereon at six (6%) per cent from the 1st day of February, 1940, until paid, less the sum of Forty (\$40.50) Dollars and Fifty Cents, semi-annual premium payment accruing on the policy sued on herein; together with her costs and disbursements incurred by reason of this action, taxed and allowed in the sum of \$82.70.

Dated this 2nd day of May, A.D., 1941.

Approved as to form:

Ellinwood and Ross

Attorneys for Defendant

By JOS. S. JENCKES, JR.

[Endorsed]: J. D. Filed May 2 1941 Edward W. Scruggs, Clerk United States District Court for the District of Arizona by Gwen J. Ballard, Deputy Clerk. [60]

[Title of District Court and Cause.]

MOTION TO ENTER JUDGMENT IN AC-
CORDANCE WITH DEFENDANT'S MO-
TION FOR AN INSTRUCTED VERDICT,
AND MOTION FOR NEW TRIAL

Comes now the defendant and moves the Court for an order setting aside the verdict and judgment herein and entering judgment in accordance with defendant's motion for a directed verdict. In the event the aforesaid motion is denied, defendant moves the Court for an order granting a new trial of the above-entitled cause for the following reasons, to-wit:

1. The Court erred in refusing to instruct the jury to return a verdict for defendant;
2. The Court erred in certain particulars in its general charge to the jury, specifically excepted to by the defendant at the time.
3. The verdict and judgment are not justified by the evidence.
4. The verdict and judgment are contrary to law.

ELLINWOOD & ROSS
JOS. S. JENCKES, JR.
EVERETT M. ROSS [61]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS
AND AUTHORITIES

In support of its motion for an order setting aside the verdict and judgment and entering judgment in accordance with defendant's motion for a directed verdict, defendant submits the following points and authorities:

I.

It Was Essential to the Existence of a Binding Contract of Insurance That the Policy in Question Be Delivered to Applicant. At the Trial of the Cause There Was No Evidence Whatever Showing That the Policy Was Delivered to Zeno A. Rogers.

*

*

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*

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II.

Aside from the Question of Delivery, There Could Be No Binding Contract Until Rogers Signed the Agreement Accepting the Policy as Modified.

*

*

*

*

*

III.

There Was No Evidence Either That the First Premium Was Paid in Cash, or That the Payment of Such Premium in Cash Was Waived by a Duly Authorized Agent of Defendant.

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*

(a) The Court erred in giving plaintiff's instruction [62] No. 1.

* * * *

(b) The Court erred in giving plaintiff's instruction No. 2.

* * * *

(c) The Court erred in giving plaintiff's instruction No. 3.

* * * *

(d) The Court erred in giving plaintiff's instruction No. 4.

* * * *

(e) The Court erred in giving plaintiff's instruction No. 6.

* * * *

[Endorsed]: Filed May 3, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen. J. Ballard, Deputy Clerk. [63]

[Title of District Court.]

MINUTE ENTRY OF
SATURDAY, JUNE 28, 1941
(Phoenix Division)

April 1941 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

It Is Ordered that Defendant's Motion to set aside the verdict and judgment herein and enter

judgment in accordance with defendant's motion for a directed verdict be and it is denied.

It Is Further Ordered that Defendant's Motion for a New Trial be and it is denied. [64]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

To Lois Rogers, and her attorneys, John Francis
Connor and Dougherty & Chandler:

Notice is hereby given that New York Life Insurance Company, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 23rd day of April, 1941.

ELLINWOOD & ROSS

EVERETT M. ROSS

Attorneys for Appellant

807 Title & Trust Bldg.

Phoenix, Arizona

[Endorsed]: Filed Jul. 10, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen. J. Ballard, Deputy Clerk. [65]

[Title of District Court and Cause.]

STIPULATION WAIVING
BOND ON APPEAL

It Is Hereby Stipulated and Agreed by and between plaintiff and defendant, through their respective counsel of record, that the giving of a bond for costs on appeal to the Circuit Court of Appeals of the Ninth Circuit from the judgment entered herein on the 23rd day of April, 1941, in favor of plaintiff and against defendant, as required by Rule 73 of Rules of Civil Procedure for the District Courts of the United States, is hereby waived, and said appeal shall be prosecuted as if a bond in due form had been filed as of the date of filing this stipulation.

It Is Further Stipulated that, pending the disposition of said appeal by the Circuit Court of Appeals of the Ninth Circuit, plaintiff shall not have execution issued on said judgment.

Dated this 9th day of July, 1941.

DOUGHERTY & CHANDLER

Attorneys for Plaintiff

ELLINWOOD & ROSS

EVERETT M. ROSS

Attorneys for Defendant

[Endorsed]: Filed Jul. 10, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen. J. Ballard, Deputy Clerk. [66]

[Title of District Court and Cause.]

STATEMENT BY DEFENDANT AND APPELLANT OF POINTS UPON WHICH IT INTENDS TO RELY ON APPEAL

Comes now New York Life Insurance Company, the appellant and defendant above named, by its attorneys Ellinwood & Ross, Jos. S. Jenckes, Jr. and Everett M. Ross, and states that the following is a concise statement of the points on which it intends to rely on the appeal of the above-entitled action to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

The Court erred in denying defendant's motion at the close of all the evidence to instruct the jury to return a verdict for defendant. Said motion should have been granted for the following reasons: (a) It was essential to the existence of a binding contract of insurance that the policy in question be delivered to applicant. At the trial of the cause there was no evidence that the policy was so delivered. (b) There could be no binding contract of insurance until the applicant signed the agreement accepting the policy as modified. (c) There was no evidence either that the first premium was paid in cash, or the payment of such premium in cash was waived by a duly authorized agent of defendant.

II.

The Court erred in certain particulars of its general charge to the jury, namely, in giving plaintiff's instructions No. 1, 2, 3, 4, and 6. The defendant specifically excepted to said instructions at the time and set forth the grounds for said objections.

III.

The verdict and judgment were not justified by the evidence and were contrary to law in that there was no evidence that there was a binding contract of insurance in existence.

Dated: July 17, 1941.

ELLINWOOD & ROSS

JOS. S. JENCKES, JR.

By E. M. R.

EVERETT M. ROSS

Attorneys for defendant

Received a copy of the within Statement by Defendant and Appellant of Points Upon Which It Intends to Rely on Appeal this 17th day of July, 1941.

DOUGHERTY & CHANDLER

Attorney for Plaintiff

[Endorsed]: Filed Jul. 17, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen. J. Ballard, Deputy Clerk. [68]

[Title of District Court and Cause.]

DEFENDANT AND APPELLANT'S DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the District Court of the United States of America in and for the District of Arizona:

You are hereby requested to make a record to be filed in the United States Court of Appeals for the Ninth Circuit pursuant to an appeal taken in the above-entitled action, and to include in such record on appeal the following portions of the record, proceedings and evidence of the above-entitled case:

1. Summons and return.
2. Complaint.
3. Petition for removal.
4. Removal bond
5. Notice of filing of and hearing on petition for removal
6. Affidavit of service of notice
7. Order for removal
2. Amended complaint
9. Amended answer
10. Order setting cause for trial on April 22, 1941
11. Order denying defendant's motion for instructed verdict
12. Verdict
13. Judgment

14 Defendant's motion to enter judgment in accordance with defendant's motion for an instructed verdict and motion for new trial.

(a) The first paragraph and the italicized captions heading parts I, II, III and a, b, c, d, and e of the memorandum of points and authorities filed in support of said motions. [69]

15. Order denying defendant's motion to enter judgment in accordance with defendant's motion for an instructed verdict and order denying defendant's motion for new trial.

16. Notice of appeal.

17. Stipulation waiving bond on appeal.

18. Duplicate reporter's transcript of the evidence.

19. The following portions of plaintiff's Exhibit No. 3:

(a) All of the insurance policy with the exception of the following parts:

(1) The paragraph entitled "Double Indemnity"

(2) The paragraph entitled "Waiver of Premiums in Event of Total and Permanent Disability"

(3) The paragraph entitled "Participation in Surplus"

(4) The paragraph entitled "Dividends may be applied to decrease number of premium payments"

(5) The paragraph entitled "Miscellaneous Benefits"

- (6) The page entitled "Optional Methods of Settlement"
 - (7) The page entitled "Guaranteed Loan and Surrender Values"
 - (8) The page entitled "Tables of Guaranteed Loan and Surrender Values"
 - (9) The page entitled "Other Provisions" with the exception of the paragraph entitled "The Contract". Said paragraph is to be included in the record on appeal.
 - (b) All of the "Permanent Aviation Indorsement" attached to the policy.
 - (c) All of the "Acceptance of the Permanent Aviation Indorsement" attached to the policy
 - (d) Part I of the Application which is attached to the policy
 - (e) All of the Questionnaire pertaining to aeronautical activities.
20. Defendant's Exhibit C-1
21. Defendant's Exhibit E (the salutation, the fourth paragraph and the closing)
22. The following portions of Defendant's Exhibit F:
- (a) The first page, and
 - (b) Instructions No. 1, 2, 20, and the first paragraph of Instruction No. 12.
23. Statement of defendant of points upon which it intends to rely on appeal. [70]

24. Plaintiff's requested instructions No. 1, 2, 3, 4, and 6 as given.

25. This designation of contents of record on appeal.

Dated this 17th day of July, 1941.

ELLINWOOD & ROSS

JOS. S. JENCKES, JR.

By E. M. R.

EVERETT M. ROSS

Attorneys for Defendant

[Endorsed]: Filed Jul 17 1941 Edward W. Scruggs, Clerk, United States District Court for the District of Arizona by Gwen J. Ballard, Deputy Clerk. [71]

[Title of District Court and Cause.]

PLAINTIFF AND APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL.

To the Clerk of the District Court of the United States of America, in and for the District of Arizona:

You are hereby requested to make a record to be filed in the United States Court of Appeals for the Ninth Circuit pursuant to an appeal taken by the defendant in the above entitled action, and to include in such record on appeal the following additional portions of the record, proceedings and evidence of the above entitled case:

1. Plaintiff's Exhibit No. 5 (Letter to New York Life Insurance Company, date October 30, 1939, signed by A. Z. Rogers, authorizing payment of \$75.00 to Stanley Clem).

2. Plaintiff's Exhibit No. 1, the following portions of the same:

(a) The Masthead.

(b) Table of "Application Leaders".

(c) Table of "Volume Leaders"

(d) Table of "App.-a-week Club report".

3. Defendant's requested instructions No. 1 and 2, as given.

4. This Designation of Additional Portions of Record on Appeal.

Dated this 22nd day of July, 1941.

JOHN FRANCIS CONNOR

DOUGHERTY & CHANDLER

By M. J. DOUGHERTY

Service of the within instrument acknowledged this 22nd day of July, 1941.

ELLINWOOD & ROSS

By. W. J. RYLEY

[Endorsed]: Filed Jul 23 1941 Edward W. Scruggs, Clerk United States District Court for the District of Arizona by Gwen J. Ballard, Deputy Clerk. [72]

In the United States District Court
for the District of Arizona

United States of America
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files in the case of Lois Rogers versus New York Life Insurance Company, a corporation, number Civ-146 Phoenix, on the docket of said Court.

I further certify that the attached pages numbered 1 to 72, inclusive, contains a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Defendant's and Appellant's Designations of Contents of Record on Appeal and Plaintiff's and Appellee's Designations of Contents, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, with the exception of the duplicate original of the reporter's transcript of the evidence, which said duplicate original of the reporter's transcript of the evidence is transmitted herewith to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record

amounts to the sum of \$16.95 and said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 8th day of August, 1941.

[Seal]

EDWARD W. SCRUGGS

Clerk [73]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly for trial in the above entitled Court, before Honorable Dave W. Ling, Judge, presiding with a jury, commencing at the hour of ten o'clock A. M. on the 22d day of April, 1941, at Phoenix, Arizona.

The plaintiff was represented by John Francis Connor, Esquire, Phoenix, Arizona, and M. J. Dougherty of Messrs. Dougherty and Chandler, Attorneys at Law, Phoenix, Arizona.

The defendant was represented by its attorneys, Messrs. Ellinwood and Ross, by Everett M. Ross and Joseph S. Jenckes, Jr., Phoenix, Arizona.

Thereupon the following proceedings were had.

[76]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

The Clerk: Civil 146, Phoenix, Lois Rogers, Plaintiff, vs. New York Life Insurance Company, a corporation, defendant.

The Court: Ready?

Mr. Connor: Ready, your Honor.

Mr. Ross: Ready, your Honor.

The Court: Call the names of eighteen jurors. As your names are called, come forward.

(Thereupon 18 jurors were called, were first duly sworn, and examined on their voir dire by the respective attorneys after which, the following jurors were selected and duly sworn: Phillip W. Ketcham; Nick King; W. H. Zeigler; H. M. Chappel; J. W. Hall; W. L. Jack; Harry H. Davis; C. L. Baldwin; L. L. Hopper; Lee T. Acton; Kay Robinson; Bruce C. Parkinson.)

The Court: You may read your complaint.

Mr. Connor: If your Honor please, I think the plaintiff would like to request that the witnesses be sworn and the rule invoked.

The Court: All right, call the witnesses.

(Thereupon the witnesses were called before the Court, duly sworn, admonished and placed under the rule, and excluded from the court room.)

(Thereupon the Amended Complaint was read to the jury by Mr. Connor, after which the following opening statement was made:) [77]

Mr. Connor: Now, gentlemen, just a short state-

ment of the issues in this case on what we propose to prove.

Mrs. Rogers, of course, the plaintiff, is represented by Mr. Dougherty and myself. The New York Life Insurance Company is being represented by the firm of Messrs. Ellinwood and Ross, represented by Mr. Everett Ross and Mr. Jenckes today. Mrs. Rogers, as the plaintiff, is the surviving wife of Zeno A. Rogers, deceased, who was killed, as the complaint says, as a result of an automobile accident on January 28th, 1940, at or near Fort Huachuca, Arizona, while traveling on the public highway.

We will show that subsequent to his death Mrs. Rogers, the plaintiff herein, made demand for the payment of that policy, and that in addition thereto she sought to comply with the requirement of the company with proofs of loss or proofs of death being furnished to the company and in response thereto the company denied liability under the policy and failed and refused to furnish or to give to her the forms on the proof of loss.

We will show—I will say that we are somewhat at a loss, I don't know exactly why the defendant company, under its premiums, has refused to pay this policy——

The Court: You can argue that after the evidence.

Mr. Connor: Well, that is merely a statement, but if it should be asserted that the deceased or the

insured failed to pay any premiums which were due, then we are prepared to show [78] that the company, through its duly authorized officers, entered into an agreement and arrangements whereby it was agreed that Mr. Rogers was to pay the semi-annual premium out of his commissions and his earnings, to be earned as a successful insurance agent for the New York Life Insurance Company, and if it should further be contended that any waiver or rider was attached to the policy which may have been accepted or signed by Mr. Rogers, then we are prepared to show that the waiver or rider which he was supposed to agree to in order to bind the company, was properly and duly executed by Mr. Rogers.

We are prepared further to show that with respect to the compliance of any condition or performance of any condition required by Mr. Rogers, that with the exception of those waived by the company, he did duly comply with all the requirements demanded by the company, and upon such state of the evidence we will ask that you return a verdict to the plaintiff in the sum of \$4,000.00 because of the death of her husband caused by accidental and solely by external means.

(Thereupon the Answer of the Defendant was read to the jury by Mr. Ross, after which he addressed the jury as follows:)

Mr. Ross: Gentlemen of the jury, now, I realize fully the pleadings where it refers to paragraphs number 1 and 2 and paragraph 5, and so on, but

the pleadings raise two issues for you gentlemen to decide; one, is the question of [79] the payment of the premium and the other is the payment of the policy.

We are prepared to show that Zeno Rogers entered into a contract to write policies for the New York Life Insurance Company on October 28th, 1939; that is, he signed up there with the local office to act as their agent in a certain designated territory.

He commenced at that business seeking applicants and sending in applications for insurance policies.

Now, in December—on December 7th, he applied for a policy on his own life, so as the pleadings disclose, a \$2,000.00 policy which carried double indemnity benefits and it was just on the ordinary life plan. Mrs. Rogers was named as beneficiary. That application was mailed into the Arizona office and forwarded to New York, and on the 19th of December a policy was issued. Now, the policy that was issued was not the same as the policy he had applied for. In other words, his application for a policy disclosed that he had engaged in a certain amount of aviation activities, so the company, in issuing this other policy, attached a rider to it modifying its liability in the event there should be a death through some cause connected with aviation, and in accordance with its usual practice it sent the policy to Arizona with the instructions that

since the policy had been modified, that it should not be delivered to the insured until he had agreed to accept those modifications on that [80] policy.

Now, we intend to show you that the New York Life Insurance Company, I suppose like most insurance companies, do not do a credit business. They do not accept anybody's credit for the first premium. You pay cash for the premium before you get your insurance. Now it is true that if you take out an insurance policy with the company agent, you might not have in mind to pay that premium right at the moment and you may give your note for it. You give your note payable to the agent and that is a transaction entirely between you and the agent. The company has no interest in it and the note is not payable to the company and if the note is not paid, the company does not go after you, they merely collect the money out of the agent's commission, and as far as the company is concerned, it still is a cash transaction. Now, where an agent is the insured, he, obviously, cannot give a note and the company is not going to look to him on his 90-day note, or something like that. It still is a cash transaction—

Mr. Dougherty: We object to that as being argumentative.

The Court: Yes, I think so.

Mr. Ross: And we will show that the company, in such a case, the policy was not to be delivered to the agent until the cash was paid.

We will explain how a policy is handled as they come out of the New York office and forwarded to the Arizona office [81] and to the agents all over the State, and we will show that this policy, through inadvertence, was forwarded to Zeno A. Rogers. We will then show that he, as agent of this company, made a monthly report on the policy which had been sent to him and he disclosed the fact that he was holding this policy. We will show that the company immediately wrote him and advised him of the mistake and told him to return the policy or pay the premium.

We will further show that the company never received any premiums on the policy and that the aviation endorsement which was on the policy was never accepted by the insured.

Thank you.

The Court: Call your first witness.

Mr. Dougherty: Mrs. Rogers.

LOIS ROGERS

was called as a witness in her own behalf and having been heretofore duly sworn testified as follows:

Direct Examination

Mr. Dougherty:

Q. Would you please state your name and place of residence for the record?

A. Lois Rogers, and I reside at 1641 East Roma.

Q. And you are the plaintiff in this case?

(Testimony of Lois Rogers.)

A. I am.

Q. And also the beneficiary in the policy involved in [82] this case?

A. I am.

Q. Who are the members of your family, Mrs. Rogers?

A. My family consists of my two sons, ages 13 and 20, and myself.

Q. Are you acquainted with—strike that our. How long have you lived in Phoenix, Mrs. Rogers?

A. I have lived here two years and a half.

Q. Are you acquainted with Mr. Lindberg, of the New York Life Insurance Company?

A. Yes, sir; I am.

Q. Are you acquainted with any of the members of the office force of that company here in Phoenix?

A. No, I am not. I have met Mr. Caskey.

Q. About October 28th, 1939, where was your husband?

A. About that time he entered the employ of the New York Life Insurance Company as a salesman and agent.

Q. You were living in Phoenix at that time?

A. Yes, we were.

Q. Do you know what territory he was assigned to?

A. Yes, he was assigned to the southern part of the State, which included Willcox, Benson and Bisbee, Fort Huachuca.

Q. The territory in the southern part of the

(Testimony of Lois Rogers.)

State. Now, do you know what his—what was the result of his efforts to sell insurance in that section of the state? [83]

A. Yes, he was—

Q. No, do you know the result of it?

A. Yes, I do.

Q. And how did that information come to you?

A. Through his letters and bulletins that the company issued from time to time.

Q. When you speak of bulletins, do you mean bulletins, announcements or papers from whom?

A. Just small papers announcing the progress of the different salesmen and how they stood.

Q. Yes, from whom?

A. From the New York Life Insurance Company.

Mr. Dougherty: I ask that these be marked for identification.

(Thereupon the documents were received as plaintiff's exhibits 1 and 2 for identification.)

Mr. Dougherty: I hand you Plaintiff's Exhibits 1 and 2 for identification and ask you to state what those are?

Mr. Jenckes: Now, if the Court please, we object to that. I think they speak for themselves.

The Court: Yes.

Mr. Dougherty: Where did you receive them—I will withdraw that question—where did you receive those?

The Witness: I received these through the mail, in letters from my husband.

(Testimony of Lois Rogers.)

Q. They are from the New York Life Insurance Company's office? A. Yes, they are. [84]

Q. At Phoenix?

(No response.)

Q. At Phoenix?

(No response.)

Q. At Phoenix? A. Yes.

Mr. Dougherty: We offer those.

Mr. Jenckes: Let me see them. (Documents were handed to Mr. Jenckes.)

Mr. Ross: We object to these, your Honor. They are immaterial and they haven't any relevancy to the issues in this case.

The Court: Well, let me see them. (The documents were handed to the Court by Mr. Ross.) Well, number 1 might be material. I can't see what number 2 would have to do with this case.

Mr. Dougherty: They are offered for another purpose, to show the employment of Rogers and his successes as an agent.

The Court: Well, this is a personal memorandum of Mr. Rogers and tells what somebody else has done. It didn't have anything to do with him. I will admit number 1. The objection to number 2 is sustained.

(Thereupon the document was received as Plaintiff's Exhibit 1 in evidence.) [85]

(Testimony of Lois Rogers.)

PLAINTIFF'S EXHIBIT NO. 1

THE ARIZONA BRANCH

WEEKLY BULLETIN

Printed Every Tuesday

Sales Records for Last Week

Application Leaders

Volume Leaders

Z. A. Rogers.....	71½
Van B. Brinton.....	7
D. K. Pence.....	6
W. L. Bowers.....	51½
E. W. Bradford.....	4
J. J. McGoey.....	4
W. M. Vreeland.....	3
Alice F. Abbott.....	3
Bill E. Christian.....	3
Jeanette Steinberg	2
Wm. P. Hanson.....	2
Gertrude D. Hays.....	2
George R. White.....	2

W. L. Bowers.....	\$20,200
Van B. Brinton.....	17,500
E. W. Bradford.....	10,500
Z. A. Rogers.....	10,087
Jeanette Steinberg.....	7,500
D. K. Pence.....	7,000
J. J. McGoey.....	6,000
W. M. Vreeland.....	6,000
Guy A. Ligon.....	4,040
Alice F. Abbott.....	4,000
Bill E. Christian.....	3,000
Wm. P. Hanson.....	3,000
George R. White.....	3,000

(Testimony of Lois Rogers.)

APP-A-Week Club Report :

Name	Consec. Wks.	Location
Max A. Dunlap.....	327	Phoenix
Wm. P. Hanson.....	277	Douglas
W. L. Bowers.....	223	Tucson
Ellen A. Copper.....	194	Phoenix
Gertrude Hays.....	194	Phoenix
J. J. McGoey.....	174	Miami
W. M. Vreeland.....	160	Tucson
E. W. Bradford.....	81	Tucson
George White.....	52	Tucson
D. K. Pence.....	50	Warren
C. C. Cutler.....	42	Clifton
G. S. Wallace.....	39	Phoenix
Z. A. Rogers.....	9	Willcox
L. K. Murphy.....	8	Yuma
Alice Abbott.....	5	Nogales
J. D. Jones.....	4	Phoenix
Kenneth Coffin.....	3	Jerome
Bill Christian.....	3	Willcox
Grover Cole.....	2	Phoenix
Guy A. Ligon.....	2	Phoenix
Ada McLaughlin.....	2	Ajo

[38]

[Endorsed]: Pltfs. Exhibit No. 1. Lois Rogers vs. N. Y. Life Ins. Co. Case No. Civ-146 Phx. Marked for identification April 22, 1941. Admitted and filed April 22, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [39]

(Testimony of Lois Rogers.)

Mr. Dougherty: This is a rather lengthy document and unless counsel for the defendant wants to read the entire document, we will only read the part that we consider relevant or pertinent.

The Court: All right.

Mr. Connor: (Addressing the jury) Gentlemen of the jury, this is the article which has been admitted in evidence as Plaintiff's Exhibit No. 1, and it is a weekly bulletin put out by the Arizona branch office of the New York Life Insurance Company. It shows the salesmen record for the last week preceding the date of its issuance and it is a sort-of sales bulletin indicating the leaders in the field among the agents who are selling policies of insurance, and it indicates as of the date of the issuance of this bulletin, that Z. A. Rogers was among the leaders who obtained applications for new policies, and I pass it on to you (handing the document to the jury).

Mr. Dougherty: Shall I proceed?

The Court: Well, probably they can't read that while you are.

Mr. Dougherty: With the permission of the Court, I simply want to point out the relative location of Zeno Rogers' name as one of the agents. The whole matter is not necessary to read, as I understand.

(Thereupon a brief period intervened in which the jurors perused Plaintiff's Exhibit No. 1 in evidence.) [86]

(Testimony of Lois Rogers.)

The Court: We will have a brief recess at this time, gentlemen. During the recess, you will not discuss the case among yourselves or permit anyone to discuss it with you. Also avoid forming or expressing any opinion upon any subject connected with it.

(Thereupon a short recess was taken, after which all parties as noted by the Clerk's record being present, the trial resumed as follows:)

LOIS ROGERS

resumed the witness stand and testified further as follows:

Direct Examination (Resumed)

Mr. Dougherty:

Q. Your husband remained in the employ of this company from October 28th, 1939, until the time of his death, did he? A. Yes, he did.

Q. Now, during that time did you have any conversations with your husband concerning his policy?

A. Yes, I did.

Q. And concerning this policy which you are suing on now? A. Yes, sir.

Q. And about when was that?

A. At Christmas time.

(Testimony of Lois Rogers.)

Q. Where?

A. At our home in Phoenix when he came home for [87] Christmas.

Mr. Ross: Your Honor, we object to any testimony relative to her conversations with the deceased husband as purely hearsay and self-serving.

Mr. Dougherty: Our contention, your Honor, and on which we are prepared to present authorities, is, that conversations of this kind concerning a specific policy is a part of the *res gestae* and is admissible. We have abundant authorities on that point, to show that communications concerning a policy made at or about the time of its delivery was a part of the *res gestae*. We think that this is admissible.

Mr. Connor: We have a case before us, your Honor, touching upon a fact situation somewhat analogous to the fact situation in this case, where there were statements made by the deceased at or about the time as in the immediate proximity to the date of the delivery of the policy and its acceptance, and the Court allowed the conversations between the deceased and those related to him with reference to what he had to say about his intentions towards that policy as a part of the *res gestae*, and because it did reflect the insured's state of mind with reference to what he thought was the terms of the policy and its delivery and its payment, and I am prepared to hand you cases if you desire to look at them.

(Testimony of Lois Rogers.)

The Court: All right.

Mr. Connor: The case is Hartford vs. Aetna Life Insurance Company, 158 Northwest at Page 280 (Handing citation [88] to the Court).

The Court: (After reading citation) Well, that seems to hold. Have you read the case?

Mr. Ross: No, I have not.

The Court: You probably would have some that held otherwise.

Mr. Ross: If there is any argument on this question, your Honor, I'd like to have it argued in the absence of the jury.

The Court: Well, I say, I suppose you have authorities to the contrary. (Addressing the jury) All right, come back at one-thirty. You will be excused now.

(Thereupon the jury retired from the court room.)

(The witness leaves the witness stand.)

Mr. Dougherty: Now, if your Honor pleases, I might state our position—

The Court: I understand your position. You have one case to support it. Now, what is the general rule? I don't care to hear any argument. I want to know the authorities. I understand your contention.

Mr. Connor: We will grant that there are cases in opposition to this which are to be found—

Mr. Dougherty: Wait a minute, the Court has—
The Court: Has such a question ever been raised in the Federal Courts?

Mr. Connor: I can't, at the moment, say.

Mr. Dougherty: There are a number of cases dealing with [89] the general subject of *res gestae*, which point to the proper application of that rule. I didn't find any insurance case on that point, but I think the rule with respect to the *res gestae* is just as broad in the Federal Court as it is in the State Court.

Mr. Jenckes: If the Court please, I think the issue here might be clarified if the plaintiff would be required to make a tender of proof or an offer of proof at this time. It is rather hard for us to tell just what this testimony is going to be, but certainly, if the testimony is going to be with respect to what the plaintiff's husband told her as to what he did or what was done in connection with this policy, why, the just plain, ordinary, everyday rule of hearsay applies, and—

Mr. Connor: Except to this—excuse me.

Mr. Jenckes: (Continuing) —and, for that reason, so that the Court and we may know just where we stand, why, we request that the Court require them to make an offer of proof so that we may make a proper objection.

The Court: Well that, probably, would be proper and then we would know what we are talking about.

Mr. Dougherty: Well, that is what I was about to explain, your Honor, a minute ago. Does the Court want us to make an offer of proof?

The Court: Yes, you can put Mrs. Rogers on the stand.

Mr. Dougherty: Take the stand, Mrs. Rogers.

[90]

LOIS ROGERS

resumed the witness stand and testified further as follows in the absence of the jury:

Direct Examination (Resumed)

Mr. Dougherty:

Mr. Dougherty: Will you read the last question, Mr. Reporter?

(Thereupon the last question propounded the witness and the answer were read by the Reporter.)

Mr. Dougherty: You stated, Mrs. Rogers, that you had had a conversation with your husband on or about December 23d—between December 23d and the 26th at your home in Phoenix concerning this policy that is being sued on in this case, is that right? A. Yes, we did.

Q. And will you state what that conversation was?

A. He had told the family, me and the two boys, that he had taken out a policy with the company on his own life for \$2,000.00.

(Testimony of Lois Rogers.)

Q. Did he say who the beneficiary was?

A. Yes, he said—he named me as beneficiary with the boys to share and share alike in the event of my death.

Q. Now, was there anything said concerning the payment of the premium? A. Yes, there was.

Q. State what that was? [91]

A. I had told him that he should have waited awhile, that he was just beginning to make good—

Q. You may omit that part, just tell what the conversation was in regard to that; what he said about the payment of the premium?

A. He said that they had made arrangements to pay for the premium, pay the premium out of his earnings as they should accrue.

Q. Who had made arrangements?

A. Mr. Rogers and Mr. Lindberg.

Q. Made arrangements for credit for the payment of the premium? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Just what did he say on that matter?

A. He said, “You needn’t worry about the payment on this because Mr. Lindberg and I have made credit arrangements whereby I will pay the premium out of my earnings as they accrue”.

Q. Do you know whether your husband had previously made any provisions regarding the payment of his premium to others? A. Yes.

Q. With whom—to whom? Had he provided to pay any other debt out of the premium? [92]

(Testimony of Lois Rogers.)

A. He had.

Q. With whom? A. With Mr. Clem.

Q. What was said concerning that?

A. He said that Mr. Clem would agree to wait for his payment until the premium on this policy had been paid.

Q. Did he tell you whether he then had the policy? A. Yes.

Q. He had it in his possession?

A. Yes, he had the policy.

Mr. Dougherty: That, substantially, your Honor, is what our proof would be. We expect to support that by corroborating testimony, by the testimony of other witnesses.

The Court: That is the son?

Mr. Dougherty: No, Mr. Clem, who had the conversation with Mr. Lindberg concerning the very same thing. To tell the Court just what it is, when Mr. Rogers went to work for the company, in order to support his family he borrowed some money from a man named Clem and he agreed to repay Clem out of his earnings, and when he took out this policy, Clem waived the payment of his debt until after the policy premium was paid to the New York Life.

Mr. Jenckes: Now, if your Honor please, we wish to interpose an objection to all that line of testimony on the grounds, in the first place, it is immaterial and has no bearing on the case; that is, the fact that Mr. Rogers told his [93] wife these

(Testimony of Lois Rogers.)

things is wholly irrelevant, immaterial. In other words, if they are attempting to prove merely that he said those things, then that he said them does not have any bearing on the case.

The Court: No.

Mr. Jenckes: Now, if they are attempting to prove the truth of the things that were said by Mr. Rogers, then you run smack against the hearsay rule. We haven't had the time to digest the case, but I think it mentioned in there his state of mind, and so forth. Of course, the only way you can prove the state of mind is, what he said. That is not what they are attempting to prove. They are attempting to prove, I assume, that credit arrangements were made for the taking care of this policy. It is wholly incompetent. As far as the *res gestae* rule is concerned, *res gestae*, as I understand it, ordinarily is where a person spontaneously makes some statement and because he has made it, under those circumstances why the rule does ordinarily require—

Mr. Connor: That is only one.

Mr. Jenckes: That is one, but I can't see any basis here for permitting this sort of testimony to go in. Otherwise, the whole case is proved right out of the mouth of Mrs. Rogers.

Mr. Dougherty: No, that is not our contention. We expect to show during the progress of this case, that not only was this policy, despite the fact that there is a [94] provision in this policy that it should not be delivered until the premium is paid, that that

(Testimony of Lois Rogers.)

is not the practice of the company at all, but despite that fact, the customary practice of the company is to deliver these policies, and to deliver them on credit and there was no exception made in this case whatever. It was in the normal course of their business that they delivered this policy and delivered it on credit. Not only that, we expect to show that when Mr. Rogers came home in response to an inquiry from his wife, he stated he had the policy, she was the beneficiary of it. That is as spontaneous as any declaration could possibly be. It was not a question of credit solely. It was a question of having some protection for his wife and is entirely spontaneous and shows his state of mind. He believed he had arranged for their protection in case of his death. It is just as spontaneous as this case was or any case could be.

(Thereupon argument between counsel.)

Mr. Dougherty: May I ask the witness one question?

The Court: All right.

Mr. Dougherty: You started to tell me what you said and I interrupted you. Will you state how you came to talk about it, in response to your conversation that you had initiated, how did you come to talk about this?

The Witness: About this particular policy?

Q. Yes? You said you had asked him something and I interrupted your conversation? [95]

A. Well, I had asked him why he didn't wait

(Testimony of Lois Rogers.)

awhile to take out the insurance for himself, wait until he was doing a little better. I said, "You are just beginning to make some headway and you should have waited. We can't afford to pay for it now", and he said, "Don't worry about that, I have made arrangements—Mr. Lindberg and I have made arrangements that I can pay this premium out of my commissions as they accrue".

Q. And was there anything said concerning what was due to Mr. Clem? A. Yes, there was.

Q. I don't recall whether you stated that. What did he say with reference to Clem waiting?

A. I said, "Well, you know you owe Mr. Clem this money and you have agreed with Mr. Clem and Mr. Lindberg to pay him out of your earnings", and he said, "Well, that is true, but Mr. Clem will wait for his until my premium is paid".

Mr. Dougherty: I believe that is all.

(Thereupon a recess was taken at 11:45 o'clock A. M.)

1:30 o'clock P. M., April 22d, 1941, all parties as heretofore noted by the Clerk's record, and the jury being present, the trial resumed as follows:

The Court: You may proceed.

Mr. Dougherty: Mrs. Rogers was on the stand.

LOIS ROGERS

resumed the witness stand and testified further as follows:

Mr. Dougherty: I believe when we recessed we had an offer made.

The Court: Yes, and you object to the proffered testimony?

Mr. Jenckes: Yes, if your Honor please, we renew that objection at this time.

The Court: The objection is sustained.

Direct Examination

(Resumed)

Mr. Dougherty:

Q. Is your husband living, Mrs. Rogers?

A. No, he is not.

Q. Where and when did he die?

A. He died January 28th, 1940, at Fort Huachuca Hospital.

Q. And what was the cause of his death?

A. He died as a result of an automobile accident causing cerebral contusions.

Q. A little louder?

A. Cerebral contusions, a broken leg, broken arm, skull fracture and shock.

Q. The accident occurred close to Fort Huachuca?

A. Yes, at the entrance of Fort Huachuca, on the [97] highway.

Q. And where was he taken?

(Testimony of Lois Rogers.)

A. He was taken to the hospital in Fort Huachuca.

Q. And that was when, what date?

A. That was January 26th, the evening of January 26th.

Q. And when did he pass away?

A. He died January 28th.

Q. About what time?

A. At 5:15 in the morning.

Q. Now, where had he been staying previous to this accident?

A. He had been in Willcox, Arizona, at the Page Hotel.

Q. And where did he have his effects at that time? A. In his hotel room at Willcox.

Q. Page Hotel? A. At the Page Hotel.

Q. Now, do you have the insurance policy that is sued on in this case, Mrs. Rogers?

A. No, I do not.

Q. Do you know what happened to it?

A. Yes, I do.

Q. Will you state what happened to it?

A. Well, Mr. Lindberg took it from my husband's room the day following his death.

Q. From the hotel room, the Page Hotel at Willcox? A. Yes. [98]

Q. Was that with your knowledge or consent?

A. No, it was not. It was against my instructions.

(Testimony of Lois Rogers.)

Q. Did you subsequently ask for the return of that policy? A. I did.

Q. What did he say?

A. He said that he would not give it to me.

Q. Now, you have been advised, have you, that the sole cause of your husband's death was this accident? A. Yes.

Q. Where and when was your husband buried?

A. He was buried here in Phoenix, February 1st, 1940.

Q. Now, subsequent to his burial, did you make demand on the company for the necessary blanks to prove the death of your husband?

A. Yes, I did.

Q. To whom did you make the demand?

A. To Mr. Lindberg

Q. Yes, and what did he say?

A. He said that I could not have the forms to fill out because I could not—they would not pay on the policy anyway.

Q. He didn't give you the forms? A. No.

Q. And he said they were not responsible on the policy? A. Yes. [99]

Q. Is that the reason why you have not made formal proof of your husband's death?

A. That is right.

Q. Now, since that time have you asked them to pay this policy, at that time or since your husband's death? A. Yes, I asked twice.

Q. That is since your husband's death?

(Testimony of Lois Rogers.)

A. Since his death.

Q. And before you brought this suit?

A. Yes.

Mr. Dougherty: That is all. You may take the witness.

Mr. Ross: We have no questions.

The Court: That is all.

Mr. Dougherty: Now, I want to reserve the right to recall this witness after I progress further with the case.

The Court: All right.

(The witness was excused.)

Mr. Dougherty: Mr. Caskey. I would like to announce that we are calling Mr. Caskey as Cashier of the defendant company. At this time I would like to ask counsel if they would introduce the policy that the suit is involved on.

(Thereupon the document was produced by Mr. Ross.)

Mr. Dougherty: May we have this marked for identification? Wait a minute, there are three parts to it, are there not?

Mr. Ross: Yes. [100]

Mr. Dougherty: In the application. You may mark it.

(Thereupon the document was marked Plaintiff's Exhibit 3 for identification.)

D. F. CASKEY

was called as a witness for cross-examination by the plaintiff, and having been heretofore duly sworn, testified as follows:

Cross-Examination

Mr. Dougherty:

Q. I hand you Plaintiff's Exhibit 3 for identification, Mr. Caskey, and ask you to examine it—will you please state your name for the record, Mr. Caskey? A. D. F. Caskey.

Q. Have you examined the instrument?

A. Yes, sir.

Q. Your name, I was a little premature in offering it. Your name is Mr. Caskey. A. Yes.

Q. What are your initials? A. D. F.

Q. Where are you employed, Mr. Caskey?

A. You mean now?

Q. Yes?

A. In the New York Life, Title and Trust Building.

Q. What is your position? [101]

A. Cashier.

Q. And were you the Cashier of the company on December 29th? A. Yes, sir.

Q. On December 29th, 1939? A. Yes, sir.

Q. And as such, did you have charge of the policies of the life insurance company, the defendant in this case?

A. Well, yes, I suppose what you mean, did I have charge of sending the policies out?

(Testimony of D. F. Caskey.)

Q. Yes? A. I did.

Q. And you have examined this policy?

A. Today?

Q. Yes? A. Yes, sir.

Q. And this is the policy issued on the life of Zeno A. Rogers? A. Yes, sir.

Q. And did you mail this policy to Mr. Zeno A. Rogers?

A. Well, it was mailed under my supervision.

Q. It was mailed either by you or by somebody who was working under your supervision?

A. Yes, sir.

Q. Regular mail through the United States Post Office? A. Yes. [102]

Q. Postage prepaid and addressed to him where? A. Well, as I recall, Willcox.

Q. And is this policy in the same form and condition it was in when you mailed it?

A. As far as I know. I would not think there would be any change in it. It appears all to be there.

Q. This dark sheet here is a photostatic copy of the application?

A. Yes, sir; that is photostated at New York.

Q. And was a part of the policy? A. Yes.

Q. When did you next see the policy, after you mailed it to him?

A. Well, I think—well, it was after his death. I would not know the exact time about that.

(Testimony of D. F. Caskey.)

Q. And you saw it back in the New York—the office of the New York Life, is that right?

A. Yes, I recall I did.

Mr. Dougherty: That is all, Mr. Caskey.

Mr. Ross: I have no questions.

(Thereupon the witness was excused.)

Mr. Dougherty: Call Mr. Lindberg for cross-examination. I don't know whether it is necessary to state that we call this witness for cross-examination, but he is Manager for the opposite—for the defendant. We call him as such. [103]

ARTHUR F. LINDBERG

was called as a witness by the plaintiff for cross-examination, and being first duly sworn, testified as follows:

Cross-Examination

Mr. Dougherty:

Q. Will you please state your name and residence, Mr. Lindberg?

A. Arthur F. Lindberg, Phoenix, Arizona.

Q. How long have you lived here?

A. Since October 14th, 1938.

Q. And are you employed here? A. I am.

Q. By whom?

(Testimony of Arthur F. Lindberg.)

A. By the New York Life Insurance Company.

Q. How long have you been so employed?

A. Here in Phoenix?

Q. Yes? A. Since October 14th, 1938.

Q. And in what capacity?

A. From October 14th, 1938, until January 1st, 1939, my title was that of agency organizer, and on January 1st, 1939, I was appointed agency director for the company in Arizona.

Q. And where is the company's office?

A. Local office? [104]

Q. Yes?

A. At 420 Title and Trust Building.

Q. Is that the agency office for the entire State of Arizona? A. That is correct.

Q. And you are the chief executive officer for the company in the State of Arizona?

A. That is correct.

Q. And as such you employ and discharge salesmen?

A. No. The company employs the salesmen. My—I make my recommendations to the company as to the employment of the salesmen, but the final approval and the contract with the salesman comes direct from the company based on my recommendation, if they concur in my recommendation.

Q. You have power of attorney on file out at the Corporation Commission, under which you are authorized to hire and discharge agents, have you not? A. I have authority to recommend to the

(Testimony of Arthur F. Lindberg.)

company as to the hiring and discharging of agents, but the final action is by the company.

Q. Of whom does your office force consist?

A. You mean our cashier's department?

Q. Well, how is your office organized? Who do you have in there?

A. Well, we have a cashier's department which consists of a cashier, who is Mr. Caskey, and under his supervision [105] he has twelve, I believe now thirteen clerks and stenographers.

Q. Any other department?

A. Not in our local office. The agents whom we appoint out in the field are under my supervision. They operate independently, under an independent contract from the home office.

Q. Well, they operate out of your office?

A. Yes.

Q. Your business operations extend over the entire State of Arizona?

A. That is correct.

Q. And you have a large number of agents?

A. Approximately forty throughout the State of Arizona.

Q. Each one selling life insurance?

A. Yes.

Q. In his lifetime, were you acquainted with Zeno A. Rogers?

A. I was.

Q. And I believe he was employed as an agent by your company?

A. He had filed an application to be employed as an agent and he had signed the necessary con-

(Testimony of Arthur F. Lindberg.)

tract papers and they, in turn, had been forwarded to our home office for their final approval.

Q. Well, he had been employed as an agent, had he? [106]

A. Yes, at my recommendation.

Q. Well, it wouldn't make any difference? I wasn't asking that. I move that it be stricken. You had employed Zeno A. Rogers as agent, had you not?

A. I had authorized him to write and solicit applications for life insurance until such time as his contract was approved by the company.

Q. Is there any particular reason for you avoiding a direct statement that you employed him?

A. Well, I do not employ salesmen. The company——

Q. You are the man he talked to and sought employment? A. Yes.

Q. You are the man that put him to work?

A. I authorized him to solicit and write applications for life insurance, but I have no authority to approve any contract.

Mr. Dougherty: I move that be stricken from the records, not responsive to the question.

The Court: It may stand. That is the way he explained it in the beginning.

Mr. Dougherty: Now, when did he start to work?

The Witness: He arrived in Willcox, as I recall, either the latter part of October or the first part of November.

(Testimony of Arthur F. Lindberg.)

Q. Did he continue to work up to the time of his death? A. That is correct. [107]

Q. Now, about December 7th, Mr. Rogers applied for a policy in your insurance company?

A. I believe that is the correct date.

Q. And that application was sent forward to your New York office, was it?

A. That is correct.

Q. And was there approved? A. Yes.

Q. And returned to your local office?

A. Yes.

Q. And I show you Plaintiff's Exhibit 3 for identification and ask you if that is the policy applied for by Mr. Rogers and approved by your company, mailed to Mr. Rogers by Mr. Caskey?

A. Yes, this is the policy. It was mailed under Mr. Caskey's supervision.

Q. That is properly executed by your company?

A. Yes.

Mr. Dougherty: We offer this policy in evidence.

Mr. Ross: There is no objection.

(Thereupon the document was received as Plaintiff's Exhibit 3 in evidence.)

(Testimony of Arthur F. Lindberg.)

PLAINTIFF'S EXHIBIT No. 3

New York Life Insurance Company
A Mutual Company Founded in 1845
Agrees to Pay

to Lois W., Wife of the Insured, or in Event of Her Prior Death, to Gale A. and Russel L. Rogers, Sons of the Insured, Share and Share Alike, or to the Survivor, Beneficiary (with right on the part of the insured to change the beneficiary in the manner provided herein), Two Thousand Dollars (the face of this policy) upon receipt of due proof, on forms prescribed by the Company, of the death of Zeno A. Rogers, the Insured, or Four Thousand (double the face of this policy) Dollars if such death resulted, before the anniversary of this Policy on which the Insured's age at nearest birthday is 65, from accidental means as defined in and subject to the provisions set forth under "Double Indemnity."

And upon receipt of due proof that the Insured is totally and presumably permanently disabled before the anniversary of this Policy on which the Insured's age at nearest birthday is 60, the Company agrees to waive payment of premiums, as provided under "Waiver of Premiums in event of Total and Permanent Disability."

This contract is made in consideration of the application therefor and of the payment in advance of the sum of \$40.50, the receipt of which is hereby

(Testimony of Arthur F. Lindberg.)

acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Nineteenth day of June Nineteen Hundred and Forty, and of a like sum on said date and every Six calendar months thereafter during the lifetime of the Insured.

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein. [40]

(The above premium includes \$1.54 for the Double Indemnity Benefit and \$2.16 for the Disability Benefit.)

This Policy shall take effect as of the Nineteenth day of December, Nineteen Hundred and Thirty-Nine, which day is the anniversary of this Policy.

The Benefits and Provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this Nineteenth day of December, Nineteen Hundred and Thirty-Nine.

ALFRED L. AIKEN

President

FREDERICK M. JOHNSON

Secretary

D. D. LURIE

Registrar

(Testimony of Arthur F. Lindberg.)

939-50

O. L.

D.-D. I.

Age 42

Examined EE

BP

Ordinary Life. Insurance Payable at Death.

Premiums Payable during Lifetime unless Dividends Applied to Shorten Premium Paying Period. Waiver of Premium Disability Benefit. Double Indemnity Benefit. Annual Participation in Surplus.

The Contract: This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify [41] this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this policy are payable at the Home Office of the Company in the City and State of New York, and the surrender of this Policy will be required in any settlement thereof. [42]

(Testimony of Arthur F. Lindberg.)

INDORSEMENTS
PERMANENT AVIATION CLAUSE

Anything in this Policy to the contrary notwithstanding, the death of the Insured as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, is a risk not assumed under this Policy, but upon receipt of due proof of the death of the Insured, as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger or otherwise (other than as a fare-paying passenger as defined above) the Company will pay to the beneficiary in lieu of the amounts provided in this Policy, the reserve on the face amount of this Policy at the date of death, and the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend deposits, less any indebtedness to the Company against this Policy.

NEW YORK LIFE INSURANCE CO.

By FREDERICK M. JOHNSON

Secretary

New York, Dec. 19th, 1939

996-32(A)

(Testimony of Arthur F. Lindberg.)

In accordance with the provisions of the Insurance Law of Arizona, settlement under this policy, if it becomes a claim by the death of the Insured, shall be made upon receipt of due proof of death and of the interest of the claimant, and not later than two months after the receipt of such proofs.

NEW YORK LIFE INSURANCE CO.

By FREDERICK M. JOHNSON E
Secretary

New York, Dec. 19th, 1939

(897-21) [43]

New York Life Insurance Company,
51 Madison Avenue,
New York, N. Y.

Gentlemen:

It is understood and agreed that Policy No. 17 507 735 is written with the following endorsement:

PERMANENT AVIATION CLAUSE

Anything in this Policy to the contrary notwithstanding, the death of the Insured as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between

(Testimony of Arthur F. Lindberg.)

definitely established airports, is a risk not assumed under this Policy, but upon receipt of due proof of the death of the Insured, as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger or otherwise (other than as a fare-paying passenger as defined above) the Company will pay to the beneficiary in lieu of the amounts provided in this policy, the reserve on the face amount of this Policy at the date of death, and the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend deposits, less any indebtedness to the Company against this Policy.

ZENO A. ROGERS

Applicant

Dated Dec. 19th 1939

Witness

Forwarded to the Comptroller's Department
from Arizona Branch Office. [44]

Peerless Stages, Inc.
STATEMENT OF PROFIT AND LOSS FOR YEAR 1935

Page 2

	Total All Divisions	Oakland-Hayward Divisions
Operating Expenses (Brought Forward).....	\$214,247.69	\$110,117.38
Administration Expenses		
Gen'l. Off. Sals. & Exp.....	\$ 11,028.34	\$ 5,668.26
Gen'l. Off. Clerks—Sals. & Exp.....	6,573.34	3,378.51
Stationery, Prtg. & Supplies.....	2,009.72	1,032.94
Misc. Gen'l. Office Exp.....	249.11	128.04
Telegraph & Telephone.....	1,289.01	662.51
General Legal Expense.....	4,395.88	2,259.36
Misc. Expense.....	349.37	179.57
Total Administrative Exp.....	\$ 25,894.77	\$ 13,309.19
Total Operating Expense.....	\$240,142.46	\$123,426.57
Operating Taxes, Rents & Depreciation		
Operating Taxes		
Gasoline Taxes.....	\$ 13,000.43	\$ 6,681.86
Public Utility Taxes.....	19,457.70	10,000.72
Federal Cap. Stock Taxes.....	112.00	57.56
Federal Excise Taxes.....	6,142.02	3,156.83
Total Operating Taxes.....	\$ 38,712.15	\$ 19,896.97
Operating Rents		
Shop Rents.....	\$ 2,700.00	\$ 1,387.73
Terminals & Stations Rents.....	316.00	162.41
Office Rent.....	810.00	416.32
Joint Facilities Rents.....	4,200.00	2,158.68
Total Operating Rents.....	\$ 8,026.00	\$ 4,126.14
Depreciation & Retirements		
Depreciation of Busses.....	\$ 30,963.18	\$ 15,914.21
Depreciation Other Prop'ty.....	4,931.37	2,534.59
Total Depr. & Retirements.....	\$ 35,894.55	\$ 18,448.80
Total Oper. Taxes, Rents & Depr.....	82,632.70	42,470.91
Total Oper. Costs.....	\$322,775.16	\$165,897.48
Net Operating Loss.....	\$ 28,960.61*	\$ 57,346.76*
Other Income		
Non-Oper. Prop'ty. Rentals.....	\$ 918.00	
Miscellaneous Income.....	284.84	
Profit or Loss from Disposal of Depr. Ppty.	894.99*	
Total Other Income.....	307.85	
Net Income.....	\$ 28,652.76*	
Other Deductions		
Interest Paid.....		
Misc. Inc. Chgs.....	\$ 1,595.15	
Non-Oper. Prop'ty. Exp. & Taxes.....	142.18	
	530.35	
Total Other Deductions.....	2,267.68	
Net Profit.....	\$ 30,320.44*	\$ 57,346.76*
Adjustments		
Add: Self Insurance Charges.....	\$ 8,679.66	\$ 4,461.35
Capitalization of 1935 Hayward Development Costs.....	61,656.07	52,885.41
Adjusted Net Profit.....	\$ 30,644.63	—0—

[104]

Page 3

[Endorsed]: Petitioner's Exhibit No. 6. Admitted
in evidence Oct. 10, 1940. [105]

5. a. The following is all the insurance now in force on my life: Western States \$5000.00.

State name of Company and Amount. (If none, say none)

b. The insurance for which I am now applying is not intended to take the place of insurance carried with this or any other Company. If it is, give particulars:—No.

6. Of the insurance on my life the amount which includes benefits in event of total disability is \$5000.00.

7. No Company has declined to issue insurance on my life or issued or offered to issue insurance on my life differing from the insurance applied for, except as follows: (If none, say none) None.

8. I have participated as a passenger or otherwise in aviation or aeronautics.

9. Additions or amendments (For Home Office use only).

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not go into force unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician or practitioner since his medical examination, and thereupon the policy shall be deemed to have taken effect as of the date specified under 3 above; provided, however, that if the applicant, at the time of making this application, pays the soliciting agent in cash the full

amount of the first premium for the insurance hereby applied for, and so declares in this application and receives from the soliciting agent a receipt therefor on the form attached as a coupon to this application and corresponding in date and number therewith, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount hereby applied for, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That the soliciting agent is not authorized to collect any premium for the insurance hereby applied for except the first premium thereon, which in no event shall exceed one annual premium for such insurance, together with the premium for preliminary term insurance, if any, and that a receipt on the form attached as a coupon to this application and corresponding in date and number therewith is the only receipt the soliciting agent is authorized to give for any payment made hereunder before the delivery of the policy. 3. That only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or

discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither of them is authorized to accept risks or to pass upon insurability. 4. That by receiving and accepting said policy, any additions or amendments hereto which the Company may make and refer to under 9 above entitled "Additions or Amendments" are hereby ratified.

Dated at Willcox, Ariz. this 7 day of Dec. 1939.

[Signature of the person applying for insurance]

ZENO ADDISON ROGERS

Witnessed by Z. A. Rogers Soliciting Agent.

Other Soliciting Agents.....

[Names and Residences of three intimate friends]

FRANK SELLARDS

Phoenix, Ariz.

FRANK LAMONT

Tempe, Ariz.

STANLEY CLEM

Phoenix, Ariz.

[Reverse not filled in] [45]

17-507-735

NEW YORK LIFE INSURANCE COMPANY

This blank is to be filled out by all Applicants where the question of possible Aeronautical activities arises in connection with his or her Application.

	Flights	Hours Flown
1.a. How many flights have you made?	a. About 500	a. 1200
b. How many flights within last two years?	b. " 10	b. 30
c. How many flights within last year?	c. 5	c. 5
d. How many flights within last six months?	d. 2	d. 1
e. When, approximately was, the last ascension?	e. One month ago	
f. Were they taken as fare-paying passenger, non-fare-paying passenger, mechanic, observer or pilot? (Specify)	f. Pilot	
g. Were they made in planes flying regularly between established airports over a scheduled air transport route? (If not, give full details.)	g. Army in 1917 & 18	
h. What was the purpose of flights—business, business experimental, pleasure or student under instruction?	h. Student & Instruction	
i. What was the character of Aircraft used—Commercial, Employer-owned, Government-owned, Self-owned, other plane? (Specify)	i. Gov. owned	
2.a. Do you now hold a pilot's license? If so, what kind?	a. Transport	
b. Have you ever held a pilot's license? If so, when and what kind?	b. See ans. to a	

c. What is the total number of solo hours you have flown to date?

c. About 1250

d. What is the approximate number of hours flown as pilot in preceding twelve months?

d. (Please enumerate)

Kind of flying	Hours flown
1. Scheduled
2. Non-scheduled crosscountry	600
3. Non-scheduled short hops	200
4. Student instruc- tion (Instructor only)	400
5. Test or experi- mental	30
Total number	1230

[46]

e. Have you ever engaged in, or do you contemplate engaging in, glider, dirigible, or balloon flying, test or stunt flying, student instruction? when, and give full details?

e. No

f. Have you ever experienced any aviation accidents? If so, when and give full details?

f. No

3.a. Have you had any training in operating aircraft? If so, when and for what purpose—commercial or private pleasure?

a. Yes—U. S. Aviation Corps 1917-1918

b. Do you contemplate any training in operating aircraft? When and for what purpose?

b. No

c. Do you own any aircraft? What type?

c. No

d. Do you contemplate ownership of aircraft? What type?

d. No

- 4.a. Are you now or have you ever been a member of the Federal or State Air Reserve Force, or of an Aeronautical Club? a. Yes. I have discontinued all flying
- b. If a member do you fly regularly or only during certain periods of the year? (Give details) b.
- c. Do you intend continuing your connection as above? (Give details) c. No
- d. Are you now or have you ever been employed by or connected with a business manufacturing, selling or operating aircraft? If so, state when and in what capacity. d. No
- e. Does the business with which you are connected maintain any aircraft for use of its officers or employees? e. No

5. To what extent do you contemplate making use of any aircraft and in what capacity? In case of an accident I *wave* all insurance.

I hereby agree that the foregoing answers are full, complete and true and together with the questions shall form a part of an application for insurance made by me to the New York Life Insurance Company on Dec. 7-1939. and I hereby renew and confirm my agreement therein.

Dated at Willcox, this 11 day of Dec. 1939.

[Applicant] Z. A. ROGERS [47]

[Witness] ARTHUR F. LINDBERG

[Endorsed]. Pltf's Exhibit No. 3 Lois Rogers vs. N.Y. Life Ins. Co. Case No. Civ-146 Phx Marked for identification Apr 22 1941 admitted and filed Apr 22, 1941 Edward W. Scruggs, Clerk, United States District Court for the District of Arizona by Wm. H. Loveless, Chief Deputy Clerk. [48]

Mr. Dougherty: Mr. Lindberg, after Mr.— will you please strike that out. Mr. Rogers was killed as a result of an accident near Fort Huachuca, was he? A. Yes. [108]

Q. About the 27th, was it?

A. The accident occurred on the 26th. His death, I understand, occurred on the 28th.

Q. Now, after his death and funeral, Mrs. Rogers asked for blanks for the proof of death, did she not? A. She didn't ask me.

Q. Well, did you tell her that the company was not responsible on this policy?

A. Our first conversation about the policy, as I recall, was over the telephone the day of Mr. Rogers death.

Q. Well, I am not interested in that. Did she, after this funeral, after the death, ask you for those forms, to make proof of death?

A. She did not ask me for the forms.

Q. On or about that time, that is, after the funeral, did you have a conversation, any conversation with Mrs. Rogers concerning that policy?

A. Along in the first part of March, Mrs. Rogers came into the office one day and said, "Mr. Lindberg, where is that policy? I am going to bat on it", and I said, "Mrs. Rogers, I am just as sorry as anybody could be that this policy was not in effect, but the truth is that the premiums are not paid and, therefore, I am afraid you would be just wasting your time going to bat on it". At that time she did not ask for claims or any other papers. That seemed to satisfy her. [109]

Q. Satisfy her that you weren't going to pay, is that right? A. She made no further request.

Q. In other words, you told her you were not going to make any payment?

A. I didn't make any such statement. I said the policy was not in effect, I thought she would be wasting her time trying to collect from it.

Q. What do you think she understood from that? A. I don't know.

Q. She probably got the impression, did she not, Mr. Lindberg, that you were not going to pay it unless she sued?

A. That is possible. I don't know. She didn't tell me what impression she got.

Mr. Dougherty: That is all.

Mr. Ross: No questions.

(Thereupon the witness was excused.)

Mr. Dougherty: Now, the policy, your Honor, is lengthy. Whether to read it all to the jury or not—

The Court: No, I don't know. That has never been done that I have ever heard.

Mr. Dougherty: I don't want to overlook that part of it and am wondering about passing it to the jury. It may take some time.

The Court: Oh, they don't want to read it.

Mr. Dougherty: May I state that this is the policy [110] issued by the New York Life Insurance Company on the life of Zeno A. Rogers for \$2,000.00 and providing for double indemnity in the case of death by accident. Attached to this policy is an original application under which the policy was issued, and among the parts of the application for the policy, Mr. Rogers expressly waived any claims from accidents on account of flying, the language being: "I hereby discontinue all flying." ("I have discontinued all flying.") That is one part. "I hereby discontinue all flying". ("I have discontinued all flying.") In case of accidental death—no. "In case of an accident from aircraft, I waive all insurance", and that is dated on the 11th day of December, 1939. Now, if there is any other part of this policy that the jury might be interested in and which we might properly permit them to see, I will be glad to conform to their compliance. This policy is dated December 19th, 1939, and among other things contains this provision: "This contract is made in consideration of the application therefor and of the payment in

advance of the sum of \$40.50, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this policy for the period terminating on the 19th day of June, 1940, and of a like sum on said date and every six calendar months thereafter during the lifetime of the insured”.

Now, your Honor, for the time being, we rest.

The Court: Very well. [111]

Mr. Ross: You say the plaintiff rests?

Mr. Dougherty: Yes.

DEFENDANT'S CASE

Mr. Ross: Call Mr. Caskey, please.

Mr. Dougherty: If your Honor please, before—I don't know, we are going to object to the introduction of any evidence on one feature of the answer here, and I am not entirely satisfied with the objection he had made in the absence or presence of the jury.

The Court: You will have to wait until the question is asked first.

Mr. Dougherty: No, it won't have to do with the question. It has to do with the matter of the pleadings.

The Court: Well, what about the pleadings?

Mr. Dougherty: Well, we do not think that the pleadings entitles the defendant to the introduction of any evidence on one feature of their answer.

The Court: Maybe they are not going to offer anything on that feature. I say, we had better wait.

Mr. Dougherty: I want to reserve the record at that time.

The Court: Well, you can object when he asks the question. We are going to try this case in as orderly a manner as possible. Go ahead. [112]

D. F. CASKEY

was called as a witness on behalf of the defendant, and having been heretofore duly sworn testified as follows:

Direct Examination

Mr. Ross:

Q. Your name is Mr. Caskey? A. Yes.

Q. Will you explain a little more in detail, Mr. Caskey, just what the nature of your duties are as Cashier for the New York Life Insurance Company?

A. Well, supervisory, just supervision of office details and the machinery of the office, and so forth; usual office duties, taking care of applications when they go in and policies when they come out; collection of premiums and accounts. The usual accounting that goes to make up a life insurance office.

Q. Do you have anything to do in the way of selling policies, dealing with the public?

A. Well, I deal with the public but I don't sell policies.

Q. Now, in what respects do you deal with the public?

(Testimony of D. F. Caskey.)

A. Well, any service that the policy-holder may want, want to discuss any of the angles on his insurance with me.

Q. Now, as Cashier of the Arizona branch office, are the books of the company kept under your supervision? [113] A. Yes.

Mr. Ross: Mark this.

(Thereupon the document was marked Defendant's Exhibit A for identification.)

Mr. Ross: Mark this.

(Thereupon the document was marked Defendant's Exhibit B for identification.)

Mr. Ross: Mr. Caskey, I hand you Defendant's Exhibit A for identification and ask you if this is a part of the bookkeeping system of the New York Life Insurance Company?

The Witness: Yes.

Q. Now, will you explain where these two sheets of paper come from, what the purpose of them is?

A. Well, this is what we call an application policy register. In other words, when an application, or you apply for insurance and the application comes into the office, why, a record is made in here under the agent's account and it gives the name of the applicant and gives the amount of insurance and the plan and details of the insurance he is applying for, and gives the date the application went to the home office for the issuance of the policy. Then, when the policy comes back the details

(Testimony of D. F. Caskey.)

of the issuance of the policy is put in here, the policy number, the date of it and the premium and the amount of money that was paid, if any was paid, and the date it was sent out to the agent, and then after that is done, when the premium is paid, it is [114] posted in here and that is the function of this register. It gives a complete picture of the application for a policy and the settlement, if any, or if it is never accepted, and the date the policy was sent back to New York to cancel.

Q. Now, do these sheets of paper contain all the records of the nature to which you have testified relating to the policies of insurance which Rogers secured as an agent of the company?

A. Yes, it carries everyone of them up to——well, I know it is the last one because it is incomplete. It ends on the day of his death. Here, the last policy is February 6th, and the first one is about November 24th. Yes. That takes care of everyone of them.

Q. And are the entries in those sheets made under your supervision? A. Yes.

Q. In the New York Life office? A. Yes.

Q. Are they made in the regular course of the company's business?

A. Yes, from the regular routine.

Q. I will hand you Defendant's Exhibit B for identification and ask you if that is also a part of the records of the New York Life Insurance Company?

(Testimony of D. F. Caskey.)

A. Yes. A part of the bookkeeping of the office.

Q. Will you explain what the purpose of those sheets is? [115]

A. Well, this is what we call a ledger account. In other words, it shows all the credits that an agent may have due him from the company, or after the credits are made, it would show the withdrawal of any money he made from the company. In other words, it is just what it—just what you call it, a ledger of debits and credits due the agent from the company.

Q. Would it contain entries of all the premium payments which were sent in by that particular agent?

A. No, this would not show the premium payments (indicating document). This (indicating another document) would show premium payments.

Q. You are referring to—

A. I am showing the register—the register shows the premium payments. If he had no money coming on the premium payments that are made, it would not show on this at all. This only shows the commissions due him and the commissions that he withdrew.

Q. Exhibit B shows merely the commissions that he drew?

A. That is right, just like a bank account. This would show premium payments. This (indicating another document) would show his commissions. Call it a commission ledger, if you want.

(Testimony of D. F. Caskey.)

Mr. Ross: Your Honor, we offer these in evidence, Defendant's Exhibits A and B for identification.

Mr. Dougherty: May we have a little while to look at [116] them? They are lengthy sheets.

(Thereupon counsel for the plaintiff peruse documents.)

Mr. Dougherty: This, your Honor, is a lengthy sheet and it concerns a great many entries concerning other persons than Zeno A. Rogers, and I can't determine just the purpose of your offering it.

Mr. Ross: It is to show the state of the account in the company of Zeno A. Rogers, and to prove that no commissions were earned by Mr. Rogers and that no premiums were paid on the policy in question.

Mr. Dougherty: The exhibit offer is so extensive we cannot see it, but we object to it as being irrelevant, incompetent and immaterial.

The Court: They may be received.

(Thereupon the documents were received as Defendant's Exhibits A and B in evidence.)

Mr. Ross: Mr. Caskey, I show you Plaintiff's Exhibit No. 3 in evidence, which is a policy of life insurance issued on the life of Zeno A. Rogers by the New York Life Insurance Company. I will ask you if the photostat attached to the policy is a true copy of an application made by Mr. Rogers for the life insurance policy with the defendant company?

(Testimony of D. F. Caskey.)

The Witness: Yes, according to our records it is.

Q. Now, referring to Plaintiff's Exhibit 1 in evidence, would you state when such an application was made? [117]

A. When he signed the application?

Q. Yes?

A. It is dated December 7th, 1939. He was examined on December 7th.

Q. Now, is there a record of that application coming through——

A. Yes.

Q. (Continuing) ——the Arizona office?

A. Yes. Here is an entry here, "two-thousand, ordinary life." It went to New York on December 13th and this policy was issued——

Q. Will you state when this policy was issued?

A. December 19th, in New York.

Q. And referring again to Defendant's Exhibit A, would you state when the policy was received by the Arizona office?

A. Well, I can't tell so much by this, you see, because we don't put the receipt date in here. It is of no consequence. You can tell from any correspondence that may have come with the policy. This policy was—it would be received in Arizona about the 23d of December, somewhere around there.

Q. Now, was the policy which was issued the same as the policy which was applied for?

Mr. Dougherty: We object to that as calling for a conclusion of the witness. The policy speaks

(Testimony of D. F. Caskey.)

for itself. The application and the policy are altogether and whether [118] they are the same or not calls for——

The Court: Well, he may answer.

The Witness: No, it was not.

Mr. Ross: Wherein was the policy changed or modified?

A. Well, it has an aviation rider in it.

Q. And this rider attached to the policy, is it the original or a copy of the agreement pertaining to the——

A. No, this would be a copy; this is a copy.

Q. Would you explain to the jury, Mr. Caskey, how that is handled; what is done with the original?

A. Well, when an application goes to the home office, when you are applying for insurance on a certain plan, if they don't issue on that plan or modify your application or put a rider on it as in this particular case, they attach a copy of it to the policy and then the original which you accept is left unattached and it comes out with the policy and then we get the applicant, and when the policy is presented to him, well, then he has to accept the policy with the modifications. In other words, he accepts the policy with the modifications by signing the amendment or rider, whatever you want to call it, accepting it. In this particular case they modified his application by putting what they call a permanent aviation clause in there, which is a restriction on the hazard, and then if he wants that

(Testimony of D. F. Caskey.)

policy that way, he has to sign that rider, that acceptance of that modification, otherwise there would not be anything [119] for him to sign. The acceptance of the policy the way it is and the payment of the premiums is satisfactory, you know, the conclusion of the deal.

Q. What is done with the original form of the rider after the applicant has signed it?

A. It is sent to the home office and filed and a copy of it is left in the policy.

Mr. Ross: Mark this.

(The document was marked Defendant's Exhibit C for identification.)

Mr. Ross: Mr. Caskey, I hand you Defendant's Exhibit C for identification and ask you whether or not these were the instruction received by the Arizona office together with the policy when it was forwarded from the home office?

A. Well, it could be verified by the number 17,507,735. Yes, this is the letter that came from New York with it, that is right.

Q. What did you call such a——

A. You mean this (indicating exhibit)? This hasn't any particular name. It is merely a form that they attach to the policy. It has about 18 different instruction headings on there and they mark the one—if there is anything for you to do that they are instructing you to do, they will "X" it there or they will write down here. In this particular case they sent the policy out and instructed us before delivery to have the—— [120]

(Testimony of D. F. Caskey.)

Mr. Dougherty: Just a moment, now. That has not been admitted in evidence yet, Mr. Ross, and undoubtedly it speaks for itself and it should be admitted.

Mr. Ross: Is it the standard practice to have such a letter of transmittal accompany every policy?

The Witness: If there are any instructions, otherwise, if there is nothing to be done and no instructions, why—and no exceptions to the application, why, they don't put it on there, no necessity for it.

Q. This was instructions from the company on the policy in question? A. Yes.

Mr. Ross: We ask that this be admitted in evidence.

Mr. Dougherty: May I ask a question?

Q. Did you show this letter to Mr. Rogers?

The Witness: No, I never saw Mr. Rogers.

Q. So far as you know, Mr. Rogers knew nothing about this letter?

A. No, he would never see that letter.

Q. This all amounts to a communication, then, between your home office in New York and your Phoenix office here?

A. In substance, to the Phoenix office. You are talking about that letter, that long form?

Q. Talking about the import of the whole——

A. I am not talking about all of it, I am talking

(Testimony of D. F. Caskey.)

about that one letter that accompanied the policy. That is between [121] the home office and the branch office.

Q. Well, this instrument is offered as a whole now?

A. Well, I am talking about this one, this right here (indicating document). That came with the policy and is instructions from the New York office to the Phoenix office.

Q. Were all parts that are now attached here, were they all attached when you got it?

A. Got the policy?

Q. No, when you got the letter?

A. No, no. These are prepared here in Phoenix.

Q. This is all you got from New York (indicating document)?

A. That is right; that is right.

Mr. Dougherty: We object to this. In the first place, these papers, the first two papers, and I presume the last papers are papers prepared in the local office that Rogers had nothing to do with and knew nothing about, and the other one is one he speaks of as coming from New York, is one that concerns the Phoenix office and the home office only and to which Rogers' attention was never called and regarding which he knew nothing. In other words, it is a self-serving declaration, nothing more. They are trying to show that instructions that were never brought to the attention of a third party may be enforced against a third party.

(Testimony of D. F. Caskey.)

Mr. Ross: Your Honor, as to the sheets attached to [122] that, we have no need to include them in the offer and the record may so show. The purpose of the offer is to substantiate our proof that the policy was forwarded to the applicant through mistake.

Mr. Dougherty: Now we ask that that statement of counsel be stricken. That is an issue in this case regarding which we think counsel has no right to make such a statement.

The Court: All right. Don't pay any attention to what either counsel say. Are those the two letters that were received from the home office, the two documents?

The Witness: Just one, your Honor, that one you have in your right hand. That is merely a carbon copy of certain details of the application as it passed through the office on the way to New York, just for our own records, of the name and age and address and so forth.

The Court: Well, then, this may be received.

Mr. Connor: Sir?

The Court: This may be received.

(Thereupon the document was received as Defendant's Exhibit C-1 in evidence.)

(Testimony of D. F. Caskey.)

DEFENDANT'S EXHIBIT No. C-1

Division of Policy Issues

Arizona Branch Office

New York, Dec. 19, 1939

Re Policy No. 17 507 735 Rogers

Gentlemen:

We send the enclosed Policy subject to the requirements or information indicated by x mark.

1. Before delivery of Policy No. have the enclosed new application signed by applicant and duly witnessed. Vital B.O.
2. In the application for this Policy applicant stated that he was born A previous application gives date of birth as Please let us have a statement over applicant's signature which date is correct.
3. The agent in this case neglected to give the Beneficiary's Christian Name in Full as called for in the application. Before delivery of policy, please obtain same over applicant's signature and forward to Home Office for our records.
4. Before delivery of Policy obtain from our Examiner without expense to the Company, satisfactory certificate of applicant's present good health and send same to this Office. Policy must not leave your hands until Health Certificate is furnished. Vital B.O.

(Testimony of D. F. Caskey.)

5. If this Policy is not delivered within fifteen days from the date it is billed to the agent, satisfactory medical health certificate without expense to the Company will be required.
6. Before delivery of Policy, obtain and send to this Office Examiner's Certificate that Vital B.O.
7. Please have our Examiner re-examine applicant's urine and certify that it is normal and specific gravity is between 1015 and 1025. Cashier to hold Policy until such Certificate re urine is in his possession. Vital B.O.
8. Before delivery of Policy, obtain and send to this Office Examiner's Certificate that query of his Report should be answered. Vital B.O.
9. Regardless of instructions printed on this form, Cashier is to hold this Policy until
V.H.O. × released. The Home Office alone has authority to release the Inspection Report in this case.
10. Regardless of instructions printed on this form, Cashier is to hold this Policy until released by our Medical Board. The Home Office alone has the authority to Order such release.

(Testimony of D. F. Caskey.)

11. Regardless of instructions printed on this form, Cashier is to hold this Policy until released. The Home Office alone has authority to order such release.
12. Policy No. is alternative with Policy No. and only may be delivered. [50]
13. Inspection Report in this case received at Home Office, and Policy may be delivered in accordance with the Company's rules.
14. Mark Policy No. void and return it with Form 2005, and give number of Policy issued in lieu.
15. In connection with the delivery of this Policy, you will please carry out instructions contained in letter from under date of
16. Date of birth and age changed to agree with information which we have on file. If incorrect, submit documentary evidence of change.
17. In view of the medical rating requiring us to write the Policy with we do not send you the Policy requested. On written request of the agent, the Company will consider issuing such Policy on the plan with
18. Before delivery of Policy have the enclosed Self-Health Certificate signed by the appli-

(Testimony of D. F. Caskey.)

cant and duly witnessed. Vital B.O. (See footnote on Certificate.)

A. E. WIEST

Superintendent

MM

Vital B.O. Before delivery of above policy the enclosed Amend. must be signed, witnessed and returned to this office.

Vital Requirements

Vital B.O.: When requirements on this sheet are marked "Vital B.O." Cashier must hold the policy until requirement is in his hands. If, however, the Agency Director is satisfied that the agent in this case is reliable, and that it is necessary for him to have the policy in order to facilitate delivery, you may, upon Agency Director's approval, give the policy to the agent, with the instructions that under no circumstances may it be delivered to the applicant until the above requirement has been obtained and found satisfactory.

Vital H.O.: When requirements are marked "Vital H.O." the Cashier must hold the policy until notified by the Home Office that policy may be delivered to the agent.

Requirements not marked either "Vital H.O." or "Vital B.O." are known as "Simple" and are to be forwarded to Selection and Rating Dept.

When the Cashier receives a "Vital B.O." requirement he must immediately forward same to

(Testimony of D. F. Caskey.)

the Comptroller's Department except Medical Vital H.O. requirements which must be sent to the Selection and Rating Department. [51]

New York Life Insurance Company
Division of Policy Issued

A. E. WIEST, Superintendent

New York,

Instructions to the Cashier.....Branch Office
No..... Name.....

In connection with the above, please note as follows:

Vital Requirements

Vital B.O.:—When requirements on this sheet are marked "Vital B.O.," Cashier must hold the policy until requirement is in his hands. If, however, the Agency Director is satisfied that the agent in this case is reliable, and that it is necessary for him to have the policy in order to facilitate delivery, you may, upon Agency Director's approval, give the policy to the agent, with the instructions that under no circumstances may it be delivered to the applicant until the above requirement has been obtained and found satisfactory.

Vital H.O.:—When requirements are marked "Vital H.O.," the Cashier must hold the policy un-

(Testimony of D. F. Caskey.)

til notified by the Home Office that policy may be delivered to the agent.

Requirements not marked either "Vital H.O." or "Vital B.O." are known as "Simple" and are to be forwarded to Selection and Rating Dept.

When the Cashier receives a "Vital B.O." requirement he must immediately forward same to the Comptrollers' Department except Medical Vital H.O. requirements which must be sent to the Selection and Rating Department.

A. E. WIEST

Superintendent [52]

[Endorsed]: Deft's Exhibit No. C-1. Rogers vs. N. Y. Life Ins. Co. Case No. Civ-146 Phx. Marked for Identification. Admitted and filed Apr. 22, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [53]

Mr. Ross: Mr. Caskey, would you explain the method of handling the policies as they come in from the New York office to the Arizona branch office and are forwarded to the agents?

The Witness: You mean all the policies that are going [123] to go out to the agents? You mean, new policies?

Mr. Ross: All new policies?

Mr. Dougherty: Well, we object to that as irrelevant, incompetent and immaterial. On what theory

(Testimony of D. F. Caskey.)

are you offering the general practice of the office?

Mr. Ross: We are showing how this policy was handled.

Mr. Dougherty: Well, this witness as he handled it or handled it under his supervision, he can testify directly about this policy.

The Court: Yes, that is probably right.

Mr. Ross: When this policy was received from the New York office, what was done with it?

The Witness: It was entered in this register, those large sheets, the details of it, the policy number and the premium and then the date it was forwarded to the agent in this particular case. The insured or applicant is also put in the register and then a record of it is made on a card, certain details of it, and then it is sent to the agent and with it is a, what you may call an invoice form giving him certain instructions on there as to what to do or what not to do, requirements and different things of that sort. That is all there is to handling policies in a branch office.

Q. And about how many policies are handled a day, as a general rule?

A. Well, you mean on an average day?

Q. On an average day? [124]

A. Oh, I'd say we would handle possibly 350 or 400 policies a month. Of course, on occasion you would have—you may have on some days a hundred policies to handle and the next day you would

(Testimony of D. F. Caskey.)

only have 20, but for a possible average, 350 to 400 a month over there.

Q. Now, is it the company's general practice in handling policies issued on the lives of agents different in any way than handling policies issued on lives of other applicants? A. Oh, yes.

Mr. Dougherty: Just a moment. You are speaking now of the practice followed in this case?

Mr. Ross: We are speaking of the practice involved pertaining to this case.

Mr. Dougherty: Unless the matter was brought to the attention of Mr. Rogers, it wouldn't have any effect in this case, would it? We object to it as incompetent, irrelevant and immaterial. If your purpose is to attempt to establish the general practice not brought to the attention of Mr. Rogers, we object to it. It is irrelevant, incompetent and immaterial.

Mr. Ross: Being brought to the attention of Mr. Rogers is not in issue here. We are showing that the policy was forwarded by mistake through——

Mr. Dougherty: We object and ask that counsel's statement be stricken. There is no such pleading before this [125] Court as would authorize the defense to offer any evidence concerning any inadvertencies or mistakes. We are prepared to meet that issue as it develops. We object to the statement on that ground. That is what I had in mind when I started with the idea of interposing a motion at that time. I think I will put it formally at this

(Testimony of D. F. Caskey.)

time. We object to the introduction of any evidence under the defendant's answer here, for the reason there is no pleading of ignorance or mistake—inadvertencies or mistakes that would justify the admission of any evidence on that issue.

The Court: Well, I know. The defendant notified Zeno A. Rogers that the policy was forwarded to him in error. What is the difference?

Mr. Connor: Your Honor please, that is a conclusion of the witness. We are prepared to show the allegation of conclusion with reference to the defendant's mistake was insufficient and not properly pleaded and that evidence is not properly admissible at such time. It is not adequate, your Honor. As I understand the rule, a mistake must be pleaded like fraud, an admission or any other essential allegations. Merely saying "I did something by mistake" does not satisfy the rules of pleading. We are to know how the mistake came about, and the Court must be in a position to justify whether that constitutes a mistake. Now, in this particular case, we will say, there was no mistake. If it was anything, it was negligence. There is no mistake here. [126] They intended to send the policy and they sent it to him, and we are——

The Court: On their pleading it says, "It shall not be delivered until the first semi-annual premium thereon in the sum of \$40.50 is paid and that the applicant signed the agreement and accepted the policy as modified".

(Testimony of D. F. Caskey.)

Mr. Connor: That was the instructions between the home office and the company.

The Court: All right. They didn't do that. They sent him the policy.

Mr. Connor: Yes, which would be merely negligence on their part. They didn't—they intended to mail him that policy and they did. There was no mistake in mailing it.

Mr. Ross: That is just what we are attempting to prove, whether there was or not.

Mr. Connor: It could not be a mistake. You intended to mail the policy and you did. Now, whether that was a mistake on Mr. Caskey's part is immaterial.

The Court: Oh, well, we can argue that later. We don't have to waste that time.

Mr. Ross: Would you read the last question, please?

(The question was read by the Reporter.)

Mr. Ross: Would you explain how the practice is different?

The Witness: Well, when an agent is handling a policy for someone else other than on his own life, we bill the [127] policy to him and he is responsible for the collection of the premium. We hold him responsible. When a policy comes out on the agent's own life, there is no one to represent him, he is representing himself, with the result that we are supposed to hold the policy and tell him that upon the payment of the premium as represented

(Testimony of D. F. Caskey.)

by the policy, we will send the policy to him; that is, the payment of the premium and his signature on any amendments to his original application.

Q. How did it happen that this policy was forwarded to Zeno A. Rogers?

A. Well, it was a routine error. Out of possibly handling, maybe, twenty-five hundred or three thousand policies a year on different lives and handling them, from in groups of 50, 75 and a hundred, I guess it would be pretty much of a routine matter on the part of the typist, and when it came through she didn't notice or recognize the name of Rogers and possibly working on anywhere from 10 to 50 at one time on her desk——

Mr. Connor: We object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness and mere hearsay, if it is not a conclusion. We do not think that a mistake can be established in that.

The Court: Well, I say, you can argue that later. I have heard that statement from you before. You will have an opportunity to argue. Just state your objection. [128]

The Witness: Anywhere from 10 to 50 policies and shows it came over her desk and she didn't recognize the name and billed it out or, rather, mailed it to him, in other words.

Mr. Ross: When did you first discover that the policy had been sent to Rogers?

(Testimony of D. F. Caskey.)

A. Well, I don't know the date, but it possibly could be told from the date of my letter to him or the date of his report that goes out to him once a month which he returns to us telling us what he has done with all the policies we have mailed to him previously.

Q. Is it the practice of the agents of the company to submit monthly reports?

A. Yes, the 15th of every month we send them a statement of the policies that they have received prior to that time on which they have not paid the premium.

(Thereupon the document was received as Defendant's Exhibit D for identification.)

Mr. Ross: Are you familiar with the handwriting of Zeno A. Rogers?

A. Yes, I think I am.

Q. I hand you Defendant's Exhibit D for identification and ask you if this is a report of the outstanding policies submitted by Zeno A. Rogers to the Arizona office?

A. Yes, it is.

Mr. Ross: We ask that this be admitted in evidence.

Mr. Dougherty: May I ask the witness a question on [129] voir dire?

Q. Mr. Caskey, I notice the capital letter "S" in one column. What does that stand for?

The Witness: I don't know. If you will let me see it, possibly I could tell you.

(The document was handed to the witness.)

(Testimony of D. F. Caskey.)

The Witness: That means "semi-annual". The premium is payable twice a year.

Mr. Dougherty: We object to the proposed exhibit on the ground it is irrelevant, incompetent and immaterial.

Mr. Ross: We would like to call your Honor's attention to the fact that this report is on his own policy, which is on a separate page.

The Court: Well, this is Rogers' own report?

Mr. Ross: It is Rogers' own report, in his own handwriting, covering the outstanding business. We offer it both as an admission by Rogers and also for the purpose of proving the circumstances surrounding the forwarding of the policy.

Mr. Dougherty: Well, we dispute very strenuously if there is any admission against interests whatever in there, or anything inconsistent——

The Court: All right, it may be received.

(The document was received as Defendant's Exhibit D in evidence.)

Mr. Ross: Will you state what you did, Mr. Caskey, on [130] receiving this report from Mr. Rogers?

A. Why, I attempted to audit the account. That is the purpose of the report. When it comes in, I take it and audit the agent's account and see if his statements on there agree with our record. In other words, if a man says, "I paid you this premium", if he states on there and said he sent you the money, I check the record to see if he did. If he didn't,

(Testimony of D. F. Caskey.)

why, I take it up with him about the discrepancy.

Q. Did you notice that Rogers' own policy was included in the report? A. Yes.

Q. And what did you do then?

A. I wrote him a letter——

Mr. Dougherty: Just a moment. May I hear the question? May I have the question read?

(Thereupon the question was read by the Reporter.)

(Thereupon a document was marked Defendant's Exhibit E for identification.)

Mr. Ross: I hand you Defendant's Exhibit E for identification and ask you if this is a letter which you wrote to Mr. Rogers?

The Witness: Yes.

Q. And what was the purpose for writing this letter? A. Well, the purpose——

Mr. Dougherty: I object to that as irrelevant, [131] incompetent and immaterial, what the purpose is.

The Court: Yes.

Mr. Ross: I ask at this time that this Defendant's Exhibit E be admitted in evidence.

Mr. Dougherty: If the Court please, we object to it as being irrelevant, incompetent and immaterial, and for the further reason that it is purely a self-serving declaration. Now, if the intention or the purpose of offering this should be that a demand was made on Rogers for the return of the

(Testimony of D. F. Caskey.)

policy, we will stipulate that such a demand was made on him at this time, but we object to the introduction of this letter which, if consciously written to serve their purpose, could not have been written in a better way.

Mr. Ross: It was written long before any question of loss had arose. It was written long before his death, in the regular course of business.

Mr. Dougherty: It was written as advocate and not as a clerk.

The Court: Well, let me see it?

(The document was handed to the Court.)

The Court: Well, I will admit the one paragraph that I have marked here. You can read that to the jury.

Mr. Ross: You will admit the paragraph?

The Court: The other does not have anything to do with this case.

Mr. Ross: The paragraph which is being admitted in [132] evidence is this. Shall I read it to the jury?

The Court: Yes.

Mr. Ross:

“The policy issued on your life was forwarded to you in error as until settlement of the first premium has been made in cash. We are not permitted to forward a policy to an agent on his own life. Therefore, will you please see that the policy is returned to the office at

(Testimony of D. F. Caskey.)

once to be held until you can make settlement of the first premium."

DEFENDANT'S EXHIBIT E

New York Life Insurance Company

Arizona Branch Office

Suite 420 Title and Trust Building, 114 W. Adams St., Phoenix, Arizona.

Telephone: 36119, 36110.

Arthur F. Lindberg, Agency Director

David F. Caskey, Cashier

In your reply refer to file.....

Jan. 23, 1940

Mr. Z. A. Rogers

P. O. Box 126

Willcox, Arizona

Outstanding Business Report

Dear Mr. Rogers:

* * * * *

The policy issued on your life was forwarded to you in error as until settlement of the first premium has been made in cash we are not permitted to forward a policy to an agent on his own life. Therefore, will you please see that the policy is returned

(Testimony of D. F. Caskey.)

to the office at once to be held until you can make settlement of the first premium.

* * * * *

Very truly yours,

D. F. CASKEY

Cashier

(Paragraph #7 on page 1)

[Endorsed]: Defts. Exhibit No. E Rogers vs. N. Y. Life Ins. Co. Case No. Civ-146 Phx. Marked for Identification Apr. 22 1941 Admitted and filed Apr. 22 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona by Wm. H. Loveless, Chief Deputy Clerk. [54]

Q. Was the policy returned to the home office?
The Witness: Did I say "home office" or "branch office"?

Q. I think you said "home office"—oh, you just said "to the office"? A. To the office, yes.

Q. Was the policy returned to the office?

A. By Rogers? No.

Q. Referring to the books of the defendant company, which are defendant's—

A. Would be about the second or third page.

Q. Defendant's Exhibit A, is there any record of the premium having been paid on this policy?

Mr. Dougherty: Well, we object to that as call-

(Testimony of D. F. Caskey.)

ing for a conclusion of the witness. Of course, the record speaks for itself.

Mr. Ross: I will have him interpret the books of the [133] company.

Mr. Dougherty: You are trying to prove that record by a declaration, aren't you? The record speaks for itself.

The Court: Well, he is reading from the record. Of course, the record speaks for itself.

The Witness: No.

Mr. Ross: Is there any record shown there of any payment or payments on that form having been made on the premium on this policy?

A. No.

Q. If such a payment had been made to the New York Life Insurance Company, would it be recorded on the books of the company?

A. Would be recorded the same day.

Q. Mr. Caskey, when a person takes out a policy with the New York Life Insurance Company, does he have to pay the agent the first premium in cash?

A. No.

Mr. Dougherty: I will object to that as calling for a conclusion of the witness and it does not deal with this particular case. We are concerned here now not what was generally done, but what was done in this case.

The Court: No, you can't tell what these agents would do. This man would not know.

(Testimony of D. F. Caskey.)

Mr. Ross: The purpose of this line of questioning, your Honor—— [134]

The Court: Well, I know. How or what they are supposed to do, well, they may not do what they are supposed to do. How would it affect this case? People don't do a lot of things they are supposed to do.

Mr. Ross: I will grant you that, but I want to show Rogers' knowledge of the limits on the authority of other agents of the company.

The Court: Well, he was notified to return the policy and he didn't do it. He knew about that.

Mr. Ross: Mr. Caskey, when an agent is employed by the New York Life Insurance Company to write insurance, is he given any instructions regarding the method of soliciting insurance in the handling of the premiums?

The Witness: Yes.

Q. Are all such agents given a book of instructions relative to that? A. Yes.

Mr. Ross: Mark this.

(The document was marked Defendant's Exhibit F for identification.)

Mr. Ross: I will show you Defendant's Exhibit F for identification and ask you if this is a copy of the instructions which are given to all agents employed by the company (handing document to witness)? A. Yes.

Mr. Ross: I ask that this be admitted in evidence, but [135] the record may show that the

(Testimony of D. F. Caskey.)

markings in this booklet in red pencil were put in by counsel.

Mr. Dougherty: Which counsel?

Mr. Ross: This counsel.

Mr. Connor: That has no reference to this case?

Mr. Ross: No, no. That is not the book given out.

Mr. Connor: May we have a copy, Mr. Ross, that is not marked up by counsel?

Mr. Ross: Yes, I assume——

The Court: How much marking is on it? Perhaps they could be erased.

Mr. Ross: Two little red lines.

Mr. Dougherty: I would like to aks the witness—do you know if this booklet or one similar to it was given to Mr. Rogers?

The Witness: Yes.

Q. Who gave it to him?

A. Well, it was given to him by myself or by Mr. Lindberg. I don't know which one.

Q. Do you say you gave it to him?

A. I would not say that, I, definitely that I handed it to him.

Q. You did not. You would not say that you gave it to him?

A. No, I would not say that, I gave it to him.

Q. You are just guessing that one of you did?

(Testimony of D. F. Caskey.)

A. One of us would.

Mr. Dougherty: We object to it. It is incompetent, irrelevant and immaterial.

The Court: It may be received.

(The document was received as Defendant's Exhibit F in evidence.)

DEFENDANT'S EXHIBIT F.

NOTICE TO AGENTS

May 8, 1933

The following instructions to agents, supplemented by the agent's contract of employment, cover the entire scope of the agent's powers and authority, except when, in special cases, special instructions are given in writing by an officer of the Company. It is the duty of every agent thoroughly to familiarize himself with these instructions for observance of them is not merely a legal obligation, but is essential to the harmonious and successful transaction of the Company's business. In addition to this agents are reminded that, in their contracts of employment, each agent has expressly agreed with the Company to be governed strictly by the Book of Instructions to Agents issued from time to time.

This Book of "Instructions to Agents" supercedes all previous books of instructions to agents.

THOMAS A. BUCKNER

President [55]

(Testimony of D. F. Caskey.)

INSTRUCTIONS TO AGENTS

1. Authority of Agents.—Agents of the New York Life Insurance Company are authorized to solicit and receive applications for life insurance and annuities, to perform the duties specified in this Book of Instructions to Agents, and to perform such other duties in connection with said applications as the Officers of the Company may, from time to time, by special instructions, require of them.

2. Unauthorized Acts. An Agent is not authorized:

- (a) to accept risks of any kind;
- (b) to make, modify or discharge contracts;
- (c) to extend the time for paying any premium;
- (d) to bind the Company by any statement, promise or representation;
- (e) to waive forfeitures or any of the Company's rights or customary requirements;
- (f) to name any extra premium for extra risks or privileges;
- (g) to collect or receive any monies for or on behalf of, or due or to become due to, the Company except on applications obtained by or through him, and then only in exchange for the coupon receipt attached to the application corresponding in date and number with the application, and in an amount not exceeding the first premium on the insurance applied for, or except upon policies sent to him by the Com-

(Testimony of D. F. Caskey.)

pany for delivery, and then only in the amount of the first premium stated therein.

* * * * *

20. A Policy must not be Delivered.—

(a) If any change whatever has occurred in the health [56] or occupation of the applicant, or if he has consulted or been treated by a physician since the date of his medical examination. In such case the agent must at once return the policy to his Branch Office with full particulars and await further instructions. The only exception to this rule is where the full amount of the first premium has been paid in cash at the time the application was made, and the applicant has signed the declaration at the foot of the application to that effect and received the receipt provided, and the policy has been issued for the amount and on the plan applied for without advance in age or extra premium.

(b) Until the applicant signs and delivers all the papers and performs every act required of him by the Company.

(c) Until the first premium thereon is in the hands of the agent.

(d) After the expiration of one month from the date a policy is billed to the agent, (see Section 17).

* * * * *

(Testimony of D. F. Caskey.)

12. Notes. The Company will not accept a note in payment of the whole or any part of the first premium on a policy. The Company will accept cash only in payment of a first premium. If an agent takes a note, he does so at his own risk and must be personally responsible for same. Agents are instructed not to issue a coupon receipt attached to an application in exchange for a note or for anything except cash. [57]

* * * * *

[Endorsed]: Deft's Exhibit No. F Rogers vs. N. Y. Life Case No. Civ-146 Phx Marked for identification Apr 22, 1941 Admitted and filed Apr 22 1941 Edward W. Scruggs, Clerk, United States District Court for the District of Arizona by Wm. H. Loveless, Chief Deputy Clerk [58]

Mr. Ross: Mr. Caskey, as manager of the Arizona branch office, are you authorized to extend credit in payment of premiums on the policies?

Mr. Dougherty: We object to that as calling for a conclusion of the witness.

The Court: He may answer.

The Witness: You mean, extend credit on policies?

Mr. Ross: Extend credit?

A. Absolutely not.

Q. Is there any record of credit ever having been extended in this office for the payment of the premium due on this policy? A. No.

(Testimony of D. F. Caskey.)

Mr. Dougherty: We object to that as calling for a conclusion of the witness and it being entirely immaterial. He is trying to make it by including—by asking if there ever was a record of it. It has nothing to do with this case.

The Court: Well, this witness had charge of the records. He would be in a position to say whether the [137] record would disclose the extension of credit. He said no. It may stand.

Mr. Ross: What is the ruling of the Court?

The Court: The witness said “no”.

Mr. Ross: Oh, that is all.

The Court: We will take our afternoon recess at this time. Gentlemen, keep in mind the Court’s admonition.

(Thereupon a short recess was taken after which, all parties as heretofore noted by the Clerk’s record being present, the trial resumed as follows:)

D. F. CASKEY

resumed the witness stand and testified further as follows:

Cross-Examination

Mr. Dougherty:

Q. I hand you the policy in this case, Mr. Caskey, and call your attention to the application of Mr. Rogers, this part of that instrument. Will you refer to that section of the application with reference to aviation? (Handing document to witness.) Have you found it?

A. Yes, right here.

(Testimony of D. F. Caskey.)

Q. What is the number of that section?

A. You mean the number of the section on this copy?

Q. Of his application there?

A. You mean his blank, the one he completed?

[138]

Q. Yes. A. The form part of it?

Q. Yes?

A. 5,794. It is merely a company form.

Q. I understand that. Will you look again?

A. All right.

Q. You observe that in what is number 4 on the second page, there is a statement by Rogers with reference to these questions, "I have discontinued all flying"; a statement by him to that effect, is that right? A. Yes.

Q. That appears as a part of the policy?

A. Yes.

Q. Now, in the next paragraph, number 5, appears the statement, "In case of an accident I waive all insurance", an accident caused by aircraft, "I waive all insurance", is that right? A. Yes.

Q. Read this section here, will you (indicating on document)?

A. "To what extent do you contemplate making use of any aircraft, and in what capacity?"

Q. Now, will you please read the answer?

A. "In case of an accident I waive all insurance."

Q. That was said with reference to aircraft, wasn't it?

(Testimony of D. F. Caskey.)

A. Well, I don't know whether it did or not. [139]

Q. That is, it is put opposite the section that relates to it?

A. Yes, it is opposite the question. It does not answer the question, but it is opposite.

Q. Well, there was waiver of all claims on account of accident concerning aircraft, wasn't there?

A. I don't know, I can't answer that.

Q. You know the question immediately preceding it deals with aircraft? A. Yes.

Q. This question is a part of that section?

A. This question 4?

Q. Yes? Well, all this section here deals with aircraft, doesn't it? A. Yes.

Q. And he states that he has discontinued all flying. All these other answers are "No", are they not?

A. Well, the first one is not. He said he is still a member of the aeronautical club, reserve corps.

Q. That is true, he said right opposite "I have discontinued all flying"?

A. Yes, to question 4.

Q. Now, under the next question here he says, and this is a part of his application, "In case of an accident I waive all insurance"?

A. Yes. [140]

Q. That accident has reference to aircraft, hasn't it? A. That is right.

(Testimony of D. F. Caskey.)

Q. And that is the same waiver that you are speaking of as not having been signed by Rogers?

A. I can't say that.

Q. Well, it deals with the same subject, that is right?

Mr. Ross: We object to that as calling for a conclusion.

The Witness: I can't interpret the clause.

Mr. Dougherty: I will interpret it so you can. You claim that Rogers failed to sign a separate paper which is similar to the one before you and which is attached to the policy, and that paper requires a waiver, a permanent waiver of aviation insurance benefits when an accident occurs from aviation, that is right?

A. Well, I would not answer it.

Q. Well, read this over (handing document to witness)?

A. I have read it hundreds of times.

Q. What does it say?

A. I would say when he signed that he accepted the aviation clause.

Q. Yes. He had already waived any claim for compensation or, rather, insurance in the event of an accident from aviation?

A. I can't answer that.

Mr. Ross: Just a minute, please, I'd like to make an [141] objection. Your Honor please, I object to this as argumentative and calling for a con-

(Testimony of D. F. Caskey.)

clusion of the witness and the document speaks for itself.

Mr. Connor: He is merely interpreting the document.

The Court: Well, the document is in evidence. He can argue it to the jury and not to the witness.

Mr. Dougherty: May I see the other instrument aviation clause introduced by the defense? You introduced this aviation clause on a separate paper, did you not, Mr. Ross?

Mr. Ross: No, I never had the original. I don't know where it is. It is not in evidence. All the record shows, that is a copy, a true copy of the original.

Mr. Dougherty: Well, on the one attached to the policy, Mr. Rogers name is signed——

Mr. Ross: No, it is typewritten. That is the one attached to the policy there. I think the witness explained that the original was sent out to the applicant and is not attached to the policy.

Mr. Dougherty: Now, Mr. Caskey, do you say that in all cases where policies of this nature, similar policies are issued on the lives of the insured, that the premium, the first premium must be paid in advance before the policy is delivered?

The Witness: You mean on the life of an agent?

Q. No, I am speaking of—— [142]

A. No.

(Testimony of D. F. Caskey.)

Q. You do deliver policies on credit?

A. No, sir.

Q. Well, how do you get around it? You don't get cash always, do you?

A. No, the agent is responsible to us.

Q. All right. Then you deliver by credit of the agent?

A. I do not.

Q. Well, your company does?

A. No, we deliver to the agent.

Q. Yes, without the pre-payment of the premium?

A. That is right.

Q. And who do you look to for payment?

A. The agent.

Q. So that you deliver that policy then on the credit of the agent?

A. No, we deliver to the agent.

Q. And who do you look to for payment?

A. The agent.

Q. The agent?

A. Yes.

Q. Now, that is extending credit to the agent, isn't it?

A. No.

Q. No?

A. No, it is not. We hold his credits for those [143] premiums.

Q. Yes, so you look to him for payment?

A. That is right.

Q. And there was nothing about the delivery of this policy that distinguished it from the delivery of any other policy to any other agent?

(Testimony of D. F. Caskey.)

A. Well, what do you mean by that? Put it a little more clearly there.

Q. Yes. You didn't get—what you are telling this jury is, you didn't get cash before this policy was delivered? A. That is right.

Q. Now, in your ordinary practice of your business, business practice rather—

A. Yes.

Q. You do deliver policies without having received a pre-payment of the premium?

A. Well, I don't—

Q. Your company does?

A. No, the agent may.

Q. How the policy finally reaches the insured I am not concerned about, but the result of the methods you employ is, that a policy is delivered to the insured in many cases without the pre-payment in cash of the premium, isn't that true?

A. Oh, yes, the agent delivers them to the applicant without pre-payment of cash. [144]

Q. That is in accordance with your business practice? A. Yes, but he is responsible to us.

Q. Yes, so that this provision that the premium must be prepaid in cash is constantly waived by your company?

Mr. Jenckes: We object to that, your Honor please, as calling for a conclusion.

The Court: He may answer.

The Witness: In other words, you mean that the

(Testimony of D. F. Caskey.)

agents constantly deliver policies to applicants without receiving cash?

Mr. Dougherty: Well, let's leave the agent out. When you deliver a policy you use the agent to make the delivery in some cases, don't you?

A. Well, in all cases.

Q. All right. Well, in this case you didn't, did you?

A. Well, this particular case, it was on the life of the agent, but I was not the agent.

Q. Then in all cases you don't use the agent as the delivery medium?

A. Unless it is on the life of an agent. I'd qualify the agent there. I was not delivering policies. What I want to put in here is, I do not deliver policies to applicants.

Q. No?

A. And the only time that we make a direct delivery from the branch office or from me as a cashier, is when it [145] is an agent of the company.

Q. Yes?

A. Now, when you say "you", you mean me making deliveries. It can only be used when I make deliveries to the agent.

Q. I assumed you occupied an important position with the company and when I say "you", I will distinguish it. I mean your company. Your company makes delivery of policies whether through agents or by whatever means you please, they do make delivery of policies without pre-payment of

(Testimony of D. F. Caskey.)

the premiums? A. Yes, all right.

Q. And in this case you sent the policy direct to Mr. Rogers? A. That is right.

Q. And that policy was in his possession when he died, wasn't it?

A. I would not know about that. We did not have it.

Q. You did not have it?

A. In the branch office. Where it was I haven't the slightest idea.

Q. Did you subsequently learn that Mr. Lindberg took it?

A. I don't know whether Mr. Lindberg took it or not. [146] Whether the policy was sent back to the branch office or whether Mr. Lindberg brought the policy to the branch office, or whether it was sent back by the authorities down there, I don't know how it got back to the branch office. I could not answer that.

Q. You do know it was brought back to the branch office?

A. I know it was brought back to the branch office, yes.

Q. I have in my hand Defendant's Exhibit B which, according to your testimony, is the debits and credits of the premiums earned by the agent?

A. Yes.

Q. And from this record it appears that your record reaches back to December only, does it not, December 24th, 1940, you said——

(Testimony of D. F. Caskey.)

A. You said this record (indicating document) ?

Q. Yes, the last entry I see here is December 24th, 1940 ?

A. Yes, sir ; that is the last entry.

Q. And your first entry is February 24th, 1940 ?

A. Whatever that first entry is up there, the date.

Q. Do you have a record of the period from October 28th, when Mr. Rogers went to work for the company ?

A. There was no record in that. There were no entries to make.

Q. Beg pardon ?

A. There were no entries to make. [147]

Q. You mean there weren't sold any policies and there were no policies delivered ?

A. We collected no premiums. He paid us no premiums.

Q. Well, just how was that handled ? You received policies, did you not ; he was selling policies ?

A. Oh, yes, that is right.

Q. In fact, you had him classified as one of the active sellers of insurance, didn't you ?

A. Well, I made no classification.

Q. No, but your record so shows ?

A. That is a matter whether he was a good agent or not.

Q. Well, at any rate, this circular which has been introduced in evidence here shows him at the top of your list, does it not ?

A. I don't know, I haven't seen it.

(Testimony of D. F. Caskey.)

The Court: Now, you are getting clear away from where you started.

Mr. Dougherty: I beg your pardon?

The Court: You are getting clear away.

Mr. Dougherty: Well, it is true. I have to examine the witness step by step. He was selling policies at that time, wasn't he?

The Witness: Well, you mean from the time he started?

Q. From the time of his employment and those times until after his death?

A. Well, I will tell you, the question could be [148] answered better, because I don't remember dates. We have forty men over there. That record there, the large record will tell you when he sold his first policy and exactly how many policies he got and received from the time he started to the date of the first entry, and I would say——

Q. You are familiar with the record?

A. Yes. I imagine there are several. I can look at it and tell you exactly how many. I would say several just off-hand.

Q. In other words, he had been selling considerable insurance and had sent up a number of policies?

A. Do you want to know the date of his first one here?

Q. Yes.

A. November 24th. What is that first date there, right at the top over the left-hand side, the first date, February 8th or something?

(Testimony of D. F. Caskey.)

Q. February 8th is the first entry on here?

A. All right, that is the date of his first commission. He started on November 24th. There are ten entries on the sheet, so I'd say there are ten, twenty, thirty—well, he had finished writing—at that time he had written, oh, I'd think it was, by the time the first entry appeared on there, maybe thirty-five policies.

Q. Do you know definitely how many policies he had sold? Can you ascertain from that sheet?

A. I can count them. [149]

Q. If you will, please?

A. Do you want me to count them?

Q. Yes?

A. (The witness complying) Well, I'd say 23, give or take 3 or 4 or 5, one way or the other.

Q. Beg pardon?

A. I'd say 23, give or take 4 or 5 one way or the other. That is, policies that were issued but not canceled.

Q. Now it frequently happens that policies written by the agent are canceled for one reason or another?

A. Yes.

Q. Would you please ascertain from there, if you can, the total number of policies that he sold in that interval?

A. Including the ones that were returned for cancellation?

Q. Yes?

(Testimony of D. F. Caskey.)

A. Did you say "sold" or do you mean just wrote them up?

Q. Wrote them up?

A. Well, I count 39, 39 applications that he submitted to the company. That includes declinations and all, that includes the ones we didn't take.

Q. Of this number there were about 23 or 24, you said, that were not canceled?

A. About 23 or 24 that were not canceled according to this, just counting roughly, that were delivered. [150]

Q. Now, these entries on the paper which I now have in my hand, Defendant's Exhibit B, these entries were all made after Mr. Rogers death?

A. Yes, sir.

Q. Now, these credits on the right-hand column of this Exhibit B represent the premiums that became due to him, is that right?

A. The commissions that became due to him.

Q. And over on the left-hand side is a column which indicates what?

A. Debits, the items that were charged against those commissions.

Q. And those items were for premiums?

A. Various indebtedness to the company, yes.

Q. Well, do they represent premiums or what?

A. I think mostly they would, yes. I think altogether they are premiums. At that time they could hardly be anything else.

Q. Beg pardon?

(Testimony of D. F. Caskey.)

A. At that time there could hardly be anything else. There may have been some medical fees in there later on.

Q. I assume you intend for the Court and jury that these are the correct records?

A. Oh, yes, they are made originally—made daily.

Q. Those records show a total collection of \$84.32 for February? [151]

A. What do you mean, collections by him or credits?

Q. Credits? A. Credits due him?

Q. Credits?

A. Credits due him. If that is what it totals, that is what it was.

Q. And for March, \$93.24?

A. Whatever it is.

Q. And for April, \$57.18?

A. You are getting that from the right-hand column, aren't you?

Q. Yes, I am taking the right-hand column?

A. Yes.

Q. And May, \$48.86? A. Yes.

Q. In June, \$56.32, is that right?

A. I don't know without looking at it. Whatever you read out I will stipulate is correct.

Q. July, \$32.94; August, \$29.06; September, \$2.95, so that those premiums were premiums that you collected after Mr. Rogers had died?

(Testimony of D. F. Caskey.)

A. Well, through our efforts, yes. Mr. Lindberg, I think, collected some of them. We wrote letters and collected some of them and some of them were collected by him before his death.

Q. But these premiums were collected by your company [152] on policies written by Mr. Rogers, that is right, isn't it? A. Yes.

Q. Now, do you remember between the 28th of October, which is the date, I believe, he was employed, and the 24th of February, that there were no cash premiums paid?

A. The first cash premium that we received, that the New York Life received on any business that Mr. Rogers wrote is the date that you see that first entry on that first sheet on the left-hand side. Whatever that date is, that is the date that we received the first money on any of those policies.

Q. Well, that is February 8th?

A. That is the first day that we received any money.

Q. Did you have any conversation with Mr. Rogers between the 28th day of October and the time you mailed him the policy?

A. I never saw him.

Q. You never saw him after that?

A. No, sir.

Q. Have you ever dealt with him directly before that?

A. No, I never saw him but, I think twice. One morning I talked with him a few minutes, I think,

(Testimony of D. F. Caskey.)

and another time I think I talked to him about five minutes, the only times I saw him.

Q. About when?

A. Oh, that is hard to say. I think it was shortly [153] after he came with the company.

Q. Sometime in October or November?

A. Probably. I know it was shortly after he contracted——

Q. As a matter of fact, Mr. Rogers was in the southern part of the State from the time of his employment until he came to Phoenix Christmas?

A. I think he went down there shortly thereafter. I wouldn't know exactly because I don't have anything to do with where they are placed. Mr. Lindberg will tell you exactly.

Q. Was your conversation regarding any of the matters you have testified to here in Court?

A. No.

Mr. Dougherty: That is all.

Redirect Examination

Mr. Ross:

Q. There has been some confusion, Mr. Caskey, on Defendant's Exhibit B. You stated, did you not, that this was a commission ledger?

A. Well, it is a—— you can call it a commission ledger, but it is, in other words, it is a credit ledger. It is the amount of money or the monies on any particular item that we would credit to him, rather than draw a check for any number of a hundred

(Testimony of D. F. Caskey.)

items due in a month. We would just throw it in an account and they draw on it at various times, [154] or once a month.

Q. Now, if any money had been sent in by Mr. Rogers in payment of the premiums he had collected on policies, which he had written, would they be noted in this ledger?

A. Yes, they would be right in there. The commission that he is entitled to for premiums that he collected or that were collected would be in the right-hand column, would be in the credit column. The amount of commission he is entitled to would be in there.

Q. Is an agent entitled to a commission before he has paid in any premiums?

A. Well, I don't see how you can pay a commission on something that is not paid on any premium. There can't be any commission.

Q. Judging by the fact that the first entry on this ledger here is February 8th, which is ten days after Mr. Rogers death, do we assume from that that no premiums had been collected on any of his business until that time?

A. No premiums had been collected by the company on any of his business until the day of that first item. We had received no remittance from Mr. Rogers during his lifetime at all.

Q. So the first commission earned by Mr. Rogers would be sometime after his death?

(Testimony of D. F. Caskey.)

A. Would be that date there, right there, February 8th, if that is what it is. [155]

Q. Does the company have any record of premiums which Mr. Rogers collected and does not send in? A. Would we know?

Q. Would you know about it?

A. We would know—well, that report that you were discussing there is sent to them on the 15th of every month and it is sent to them for that purpose, in order to get their signature, in order to get their statements over their signature, and as I say, I audit that report, and if it does not agree with the record, why, we take it up with them, but if they were to falsify that report I would have no way of knowing unless I went out to investigate and check up on the policy-holders.

Q. You mean, speak to the actual applicants?

A. Yes, call on the policy-holders, which we do very infrequently.

Q. Looking at this Exhibit A, we see that prior to his death Mr. Rogers had written up 30 or 40 policies? A. Yes.

Q. And from this it appears that he had sent in no money on any of those policies?

A. Yes, and the records of the policy register shows no premiums were ever sent in.

Q. How did it happen that those entries were made, how were these premiums collected?

A. Well, Mr. Lindberg called on all those policy-holders [156] and a great many of them, I have

(Testimony of D. F. Caskey.)

evidence there, I saw it, were policies that had been delivered and in the possession of the policy-holders. They had paid the money but we have never seen it, and a great many of those, or rather all of those credits there, all of those premiums were collected. I collected them there by letter or Mr. Lindberg called on them personally and got their remittance.

Q. Now, where Rogers collected the premium and did not send it into the company, did you offset the amount owing to the company against subsequent collections?

A. Any credit that an agent may accrue is first lien on it, that is, any indebtedness to the company. In other words, if there is any indebtedness we confiscate whatever indebtedness there is and take care of the collections.

Q. When an agent delivers the policy to an applicant and receives cash, does he give the applicant any form of receipt for the policy?

A. Well, he is not required to because the policy itself is a receipt for the payment for the first premium. There is no necessity for giving the receipt.

Q. The policy itself is a receipt for payment of the first premium. A. It states it is.

Q. And is an agent permitted to deliver a policy as a receipt without making some sort of an arrangement for the payment of premium? [157]

A. No, he is not.

(Testimony of D. F. Caskey.)

Mr. Dougherty: May I ask to hear that question read?

(The question was read by the Reporter.)

Mr. Ross: Referring to the books of the company; that is, Defendant's Exhibits A and B, could you state whether or not at the time of Rogers death, the New York Life Insurance Company was indebted to him in any amount?

The Witness: No, they were not.

Q. And you reached that conclusion by reference to what entries?

A. By the fact that we had never seen any money from him and this is the first—February 8th was the first entry we had and that would be substantiated by that entry, that policy you can find right here. You can find it in his policy register, that the first premium was reported to this office on February 8th. It would be shown right here if you want to go to the trouble to find it. On February 8th you will find it through the register account and that is the first entry we received, and every entry in this premium payment column will be subsequent to February 8th. There could not be any before that.

Mr. Ross: That is all.

Recross-Examination

Mr. Dougherty:

Q. Now, the agent may collect premiums, may he not? [158]

(Testimony of D. F. Caskey.)

A. The first premium only, represented by the policy.

Q. He may collect the first premium?

A. Yes, sir.

Q. And if his commission on that premium equals the premium, he does not remit, does he; he remits only the net premiums?

A. You said if the commission equals it?

Q. Well, if he collects the premium——

A. He collects the premium.

Q. He collects the premium and it is less or does not exceed the commission which he is entitled to, he may retain that, may he not?

A. No, no. No. I think you are a little confused there. He collects the premium——

Q. Yes?

A. And whether he collects the whole premium or part premium, is that what you mean? He can't retain anything, any of the collection he makes until he pays us the net premium. Illustrate it this way: A \$50.00 premium, if his commission is \$20.00, well, it doesn't make any difference to us whether he collects \$35.00 or thirty, we get the \$30.00.

Q. Well, all that you require him to transmit of the first premium is the net to you?

A. That is right.

Q. That means the net? [159]

A. Less the commission.

(Testimony of D. F. Caskey.)

Q. So he may retain his commission out of the premiums that he collects?

A. Well, in other words—— we will just answer this by saying that what we want is the net premium.

Q. Now, Mr. Caskey, your agents usually are used to collect notes received in payment for the premiums, are they not?

A. Well, we don't use them to collect notes, because we have nothing to do with the notes. The notes and theirs and payable to them. They can't be paid to the New York Life.

Q. They cannot?

A. We do not accept any notes.

Q. You look to the agent?

A. The agent looks to himself. We don't look to the agent at all.

Q. Now, on those premiums you say have been collected. Were any of the premiums represented by notes?

A. I imagine so. Some of those were collected?

Q. Yes? A. Oh, yes, I imagine so.

Q. Then you do collect notes for premiums?

A. Yes, sir; because the man was dead.

Q. As a matter of fact, agents frequently turn in notes and you collect it, don't you? [160]

A. Oh, no.

Q. You never collected it?

A. No, sir; just the opposite. We have nothing to do with it.

(Testimony of D. F. Caskey.)

Q. Well, if the note was made payable to Mr. Rogers, how does it come that you collected it?

A. Mr. Rogers had died. It was either pick up the policy or collect the note and we wrote to the people and asked them did they want to pay the note or did they want to pay the policy. Some people returned the policy and some of them paid the note. It was only, merely that we were attempting to collect the premium because it is a matter of business, that is all. We are in the business of selling insurance.

Q. In other words, after Mr. Rogers passed away it was purely a matter, a voluntary matter with the policy-holders whether they paid it or not?

A. That is right.

Q. You made no effort to make any collections?

A. Yes, we just told you we did.

Q. On these notes? A. Yes.

Q. On the notes? A. Yes.

Q. On the notes? A. Yes. [161]

Q. I hand you—— may this be marked for identification?

(Thereupon the document was marked Plaintiff's Exhibit 4 for identification.)

Mr. Dougherty: I hand you Plaintiff's Exhibit 4 for identification, Mr. Caskey, and ask you if you saw these notes represented by that exhibit?

The Witness: You mean after his death?

Q. Yes?

(Testimony of D. F. Caskey.)

A. I would not know whether I saw them or not. You will remember, I see hundreds of those things a year. I would not even remember the years, but I can look into the records of the policies he wrote and tell you whether or not these are the policy-holders. I can't remember hundreds of notes a year. I will imagine I did see the notes. If he wrote the policy-holders by that name and those notes were in his possession after his death, I imagine our correspondence will show where we wrote to those people and asked them if they would not pay the premium.

Q. So had Mr. Rogers lived, he would have—— it would have been his privilege and duty to have collected them?

A. And his duty to collect them, yes, sir. We had nothing to do with them.

Q. These policies, then, represent the sales that he had made of policies from your company?

A. Well, I imagine it represents the policies that he delivered, yes, sir. [162]

Mr. Dougherty: We offer this in evidence.

Mr. Jenckes: Are those offered in evidence?

The Court: Yes.

Mr. Dougherty: I beg your pardon, I didn't show them to you.

Mr. Ross: We object to this, your Honor. We don't see any purpose of this whatever, wholly immaterial.

(Testimony of D. F. Caskey.)

The Court: Well, they have not been identified yet.

Mr. Dougherty: Well, I think the witness has said that they are notes that were received by Rogers from policy-holders.

The Court: Well, he said he imagined they were. Do you know whether they are?

The Witness: I could not tell, your Honor, whether they are. I can take the record and check the notes against the ledger and see.

Mr. Dougherty: Will you please do that, then?

The Court: I will sustain the objection. Wasting time.

Mr. Dougherty: May this be marked?

(The document was marked Plaintiff's Exhibit 5 for identification.)

Mr. Dougherty: I hand you Plaintiff's Exhibit 5 for identification, Mr. Caskey, and ask you if you saw that before?

The Witness: Yes, I remember something about that. I remember—I have seen that. [163]

Q. That came into your office?

A. Well, it was in the office. Whether it was in my office or Mr. Lindberg's office, I don't know. My memory on that is, that that was in Mr. Lindberg's office. I could not testify to that. I have seen it. I know there was some sort of a deal like that with Mr. Clem.

Q. You do remember seeing this in your office?

A. Yes, I have seen a document like that and it

(Testimony of D. F. Caskey.)

must have been that, because I knew there was some sort of a deal between them, so I'd say I saw it.

Mr. Dougherty: I offer it in evidence as Plaintiff's Exhibit 5.

Mr. Ross: We object to this, your honor. I don't know what bearing it has. It is supposed to be an assignment of future commissions.

Mr. Dougherty: We propose to show that it was a part of the transactions between Mr. Rogers and the company and Mr. Clem, who will shortly be called as a witness, and I am identifying it by this witness as being an order delivered to his company.

The Court: Well, I know, but what difference does it make?

Mr. Jenckes: Is it offered in evidence?

Mr. Dougherty: It is.

Mr. Jenckes: Well, our same objection goes to the letter that we had this morning, I think, to the other [164] testimony.

The Court: Well, I assume you will attempt to connect that up?

Mr. Dougherty: Yes, I had just stated——

The Court: All right, the objection will be sustained.

Mr. Dougherty: No further questions.

The Court: That is all. Do you have anything further?

Mr. Ross: That is all.

Mr. Jenckes: Can Mr. Caskey be excused?

The Court: As far as I am concerned, he may.

Mr. Dougherty: As far as we know, I suppose we can call him.

Mr. Ross: Oh, yes. The defendant rests, your Honor.

The Court: Do you have any rebuttal?

Mr. Connor: Yes, your Honor. [165]

In Rebuttal

Mr. Dougherty: Call Mr. Davis.

BARTO C. DAVIS

was called as a witness in rebuttal for plaintiff, and being first duly sworn testified as follows:

Direct Examination

Mr. Dougherty:

Q. Will you please state your name and place of residence? A. Barto C. Davis.

Q. Where do you live, Mr. Davis?

A. I live at 17th Avenue and Camelback Road, Phoenix.

Q. What is your occupation?

A. Life insurance, Northwestern Life Insurance.

Q. Were you ever employed by the New York Life Insurance Company as an agent?

(Testimony of Barto C. Davis.)

A. Yes.

Q. When you speak of your present employment being life insurance, you mean that you are acting as agent for this company now employing you?

A. That is true.

Q. And previous to that time you worked with the New York Life?

A. That is true.

Q. For how long? [166]

A. From 1927 to approximately 1931.

Q. And did you ever work in the office, or was your work entirely in the field?

A. In the field.

Q. Are you familiar or were you familiar with the office practice of the New York Life during the time you were in their employ?

A. Yes.

Q. And were you familiar with the manner in which they handled—that is, the manner in which it handled policies; that is, the manner in which the policies were handled out of the Phoneix office?

A. My own personal ones, yes.

Q. And in that practice did you sell policies deferring the payment of premium, or did you always get cash?

Mr. Ross: We object to that, your Honor. He has testified he was employed by the New York Life in 1927 to 1931, over ten years ago. That fact would have no bearing on this jury, it is not involved here.

The Court: No, because this manager has only

(Testimony of Barto C. Davis.)

been here for a few years and maybe the practice has changed.

Mr. Dougherty: Well, I think I can qualify that. Is the practice now—— do you know whether or not the practice of the New York Life Insurance Company with respect to that point is the same now as it was when you worked there?

The Witness: According to the policies, yes.
[167]

Q. And under that practice, was the first premium always paid in cash before the policy was delivered?

Mr. Jenckes: Just a moment. If your honor please, we would like to ask this witness a few questions *voir dire*.

The Court: Yes.

Mr. Jenckes: Mr. Davis, you stated that you know that the policies of the New York Life Insurance Company are the same today as are or were at the time you were working for them?

The Witness: That is right.

Q. Upon what do you base that statement?

A. Upon my actual competition with the New York Life of the past and of the present, the way I issued these when with the New York Life Insurance Company and the way we handled our note settlement as of the present contract. If I may define myself more clearly, I will explain it.

Q. Yes, go ahead?

(Testimony of Barto C. Davis.)

A. When I was in business with them, we write a case of life insurance——

Mr. Jenckes: Just a minute, Mr. Davis. What I am trying to find out is why you know at this time that the practice of the New York Life Insurance Company is the same as it was then?

The Witness: Well, the policies haven't changed a bit and they are very definitely stated in their contracts. I have had a number of competitive cases during numerous times, [168] and through note settlement there is no difference in it. My actual practice with experience on competition, it is no different.

Q. What do you mean by "experience on competition"?

A. I mean in cases I have come in competition with the New York Life Insurance Company.

Q. In other words, you are basing your opinion upon the fact that some prospect that you were working on told you that he took out some insurance?

A. No, I mean this, Joe, that it says—— pardon me—— it says definitely in the contract of the New York Life that the premiums shall be paid in cash. If a note is taken by the agent at the time, by the New York Life, the man is not protected. His life is not protected in the event of death while that policy is going to the home office and returned. If he should be killed, he is not protected. It protects solely the agent. If the policy is delivered actually

(Testimony of Barto C. Davis.)

in the hands of the branch office, he is then protected. We use that as our——

Q. In other words, Mr. Davis, as I gather it, you are attempting to give some sort of a legal conclusion as to the effect of those contracts, is that correct?

A. I am not giving any legal effect, though we used that as a remunerative basis for settlement.

Q. How do you know that the contracts of the New York Life Insurance Company are the same today with respect to its [169] selling and handling policies as you did then; that is, from your personal knowledge?

A. Well, from my personal knowledge, as to that, Joe, I could not say, only through their contract reading.

Mr. Jenckes: Well, if your Honor please, we renew our objection to any testimony——

The Court: All right.

Mr. Dougherty: May I question him further. You say through their policies. Just what do you mean by that?

The Witness: From the life insurance company's policies written by the New York Life.

Q. You are familiar with the form of their policy? A. Yes.

Q. In similar cases?

A. That is the policy——

Q. That one you saw?

A. Ordinary life, or whatever it may be. That is what I am referring to.

(Testimony of Barto C. Davis.)

Q. And you have had occasion to compete with their agents in the field? A. That is true.

Q. And do you have occasion to know what their practice is with respect to the payment of premiums?

A. Well, at the present time I have not conferred or know anything about the practice at the office at the present time. [170]

Q. Do you know what the agents are doing in the field?

A. I do know what the agents are doing in the field, yes.

Mr. Jenckes: I'd like to ask a few more questions.

The Court: Well, he said he doesn't know anything about it. Get somebody that knows something about it. I don't want to hear any more from this witness. He said he doesn't know. Why waste time back and forth, back and forth?

Mr. Dougherty: Have you ever brokered through the New York Life Insurance Company?

The Witness: Yes, I have brokered business with them.

Q. Recently? A. Yes.

Q. Within what period of time?

A. Well, December, I believe it was.

Q. Of 1940? A. That is right.

Q. What was their practice then with respect to premiums?

(Testimony of Barto C. Davis.)

A. The premiums I had was purely cash. I don't know what their practice was.

Q. That was a brokerage transaction?

A. That is right.

Mr. Dougherty: You may step down as far as we are concerned.

(The witness was excused.)

The Court: Well, it is ten minutes to four now. We [171] will suspend until ten in the morning, gentlemen. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 3:50 o'clock P. M. of the same day.)

10 o'clock A. M., April 23d, 1941, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed.

Mr. Dougherty: Call Mr. Clem.

STANLEY CLEM

was called as a witness on behalf of plaintiff in rebuttal, and having been first duly sworn, testified as follows:

(Testimony of Stanley Clem.)

Direct Examination

Mr. Dougherty:

Q. You may state your name and place of residence, Mr. Clem?

A. Stanley Clem. 26 East Ashland, Phoenix.

Q. What is your business?

A. Lumber business.

Q. And how long have you lived here?

A. Since 1936. [172]

Q. Have you been in the lumber business during all that time? A. Yes, sir.

Q. Were you acquainted in his lifetime with Zeno A. Rogers? A. I was.

Q. How long had you known him?

A. I think I met Mr. Rogers the latter part of 1938.

Q. Are you acquainted with Mr. Lindberg of the New York Life, who sits here?

A. I only met him once.

Q. Now, will you state whether you had a conversation on or about October 28th, 1939, with Mr. Rogers and Mr. Lindberg? A. I did.

Q. Where did you have that conversation?

A. Well, a personal conversation was up in the Title and Trust Building in the New York Life Insurance Company office.

Q. And who was present?

A. Mr. Rogers and Mr. Lindberg.

Q. Mr. Rogers and Mr. Lindberg? A. Yes.

Q. Will you state what that conversation was?

(Testimony of Stanley Clem.)

Mr. Ross: Just a minute. Your Honor, before we go into this conversation with the deceased, could we have an [173] offer of proof in the absence of the jury to determine whether or not it is the same matter we went through yesterday?

The Court: Well, Mr. Lindberg was not present in the conversation that was sought to be brought out yesterday, but we will hear what it is. Go out in the hall, gentlemen.

(Thereupon the jury was excluded from the court room.)

Mr. Dougherty: Now, if your Honor please, we avow that this witness, if questioned, if we are permitted to question him, will testify that he participated in this conversation in which Lindberg was a party and it had to do with Mr. Rogers employment as a salesman. In order to effect the employment of Rogers as a salesman, it was necessary that he be advanced living expenses for himself and his family, and in response to that conversation, Mr. Lindberg or Mr. Rogers agreed to re-pay a loan of \$75.00 that Mr. Stanley Clem was to make to him, re-pay it out of his commissions, and that Mr. Lindberg agreed to that and in accordance with that Mr. Lindberg drew up an order on the company and gave it to Mr. Rogers for Mr. Clem's subsequent approval, and Mr. Clem approved it and it was—and, subsequently, that order was acknowledged and recognized by the company, and

(Testimony of Stanley Clem.)

that in subsequent conversation the matter was discussed and at that conversation Lindberg discussed the fact that they had given Zeno Rogers the policy which was to be paid out of his commissions to be earned, [174] and that he asked Mr. Clem here to postpone his payments until such time as the company had first been paid.

The Court: All right, call in the jury.

Mr. Jenckes: Before they are called in, I wonder if we could cross-examine Mr. Clem on voir dire?

Mr. Dougherty: There is no occasion for voir dire.

The Court: You can't cross-examine the witness until he has testified.

Mr. Jenckes: Well, you can object——

The Court: Well, you can object to the offer.

Mr. Jenckes: We will make an objection to the proffer on the grounds it is irrelevant, incompetent and immaterial and has no bearing upon the issues in the case and there is no showing in the record on the fact that Mr. Lindberg was there, that he was authorized and qualified or acting within the scope of his employment with the company.

The Court: All right, the objection is overruled. Call the jury.

(Thereupon the jury returned into the court room and resumed their places in the jury box.)

Mr. Dougherty: Will you read the last question?

(Testimony of Stanley Clem.)

(The question was read by the Reporter.)

Mr. Dougherty: I have asked you to state what the conversation was between yourself, Mr. Lindberg and Mr. Rogers on the occasion concerning which is October 28th, 1939?

The Witness: Well, it was relative to a loan which [175] Mr. Rogers wanted to obtain from me in order to carry him over until such time as some of his commissions had accumulated I think one-third of his commissions had accumulated to repay my loan, and I was anxious to see Rogers get employment and I agreed that if the New York Life Insurance Company would guarantee me to repay this loan out of his commissions, that I would advance to Mrs. Rogers \$15.00 a week until the \$75.00 had been used up, and I wanted some evidence to show that I would have this money coming out of his commissions, so Mr. Rogers brought down to me an assignment of his commissions—

Mr. Jenckes: Just a minute——

The Court: Just a minute. You are supposed to detail the conversation that you had. You haven't done that yet. Strike that testimony.

Mr. Dougherty: Yes. I hand you now——

The Court: Well, let him answer the question you asked him. You asked about the conversation. He has not told of any conversation.

Mr. Dougherty: Will you read the last answer.
(The last answer was read by the Reporter.)

(Testimony of Stanley Clem.)

Mr. Dougherty: Mr. Clem, will you please state as nearly as you can remember what the conversation was which took place between yourself, Mr. Lindberg and Mr. Rogers?

The Witness: Well, I think it would be probably impossible for me to state the exact words that we used. [176]

The Court: You don't have to state the exact words, just to the best of your recollection.

The Witness: I said to Mr. Lindberg that I was willing to advance to Rogers up to \$75.00 if I was assured that the money would be repaid to me. Mr. Lindberg, of course, could not say that the money would be repaid to me out of anything except Rogers' commissions, or whatever you call it, earnings out of the sale of life insurance.

Mr. Dougherty: Well, just state the language as closely as you can—— just how he said it?

A. Well, I said, "I am perfectly willing to advance to Mr. Rogers \$75.00 if I am reasonably assured that it is going to come back." Mr. Lindberg told me that he was rather impressed with Mr. Rogers' personality and he believed he could sell insurance, and I told Mr. Lindberg, "I think he could too. He is a very good salesman". Mr. Rogers said to me that he would be willing to give an order on the New York Life Insurance Company for the repayment of this loan. I was to pay it, as I said before, \$15.00 a week and give it to his wife. The gist of the conversation was just as I have said, that the

(Testimony of Stanley Clem.)

money would be re-paid to me as commissions had accrued to Rogers on the sale of life insurance.

Q. Yes. Now, after this — this conversation took place at the company office here in Phoenix?

A. Yes, at the company office. [177]

The Court: When was that conversation?

The Witness: The latter part of October.

Q. Anybody present but you three?

A. No.

Mr. Dougherty: I think I asked that question as to who was present. Later on, immediately following that, did you have any further conversation with Mr. Lindberg?

The Witness: Not except over the telephone.

Q. Well, over the telephone, did you have any further conversation with him?

A. Not until after Mr. Rogers had come to my office with this copy of the order to the New York Life Insurance to pay me the money.

Q. And Mr. Rogers, as a consequence of the conversations you had had with Lindberg and he—— him, brought to you an order?

A. That is right, a copy, I think, of the order. It may have been the original, but I don't believe it was.

Q. I want to show you Plaintiff's Exhibit 5 for identification and ask you if that is the order that Rogers brought to you?

A. That is the one, yes.

Q. Now, state what conversation, if any, you had

(Testimony of Stanley Clem.)

over the 'phone with Mr. Lindberg concerning this order?

A. Mr. Lindberg called my on the telephone. It was either the same day or the morning of the following day, and [178] asked me if the order was satisfactory to me and, of course, we had a conversation then as to Mr. Rogers ability and my experience with him which had nothing to do with this.

Q. And this order was left with you?

A. It was left with me.

Q. Mr. Lindberg—— who prepared the order, do you know?

A. I would not know that. I supposed that someone in the New York Life Insurance Company prepared it.

Mr. Dougherty: We now offer this in evidence, your Honor.

The Court: It may be received.

(The document was received as Plaintiff's Exhibit 5 in evidence.)

PLAINTIFF'S EXHIBIT NO. 5

Phoenix, Arizona,
October 30, 1939

New York Life Insurance Co.
51 Madison Avenue
New York, N. Y.

Gentlemen:

This is to authorize you to pay to Mr. Stanley Clem, one-third of the commissions that accrue to

(Testimony of Stanley Clem.)

my credit until a total amount of \$75.00 has been paid to him.

Very truly yours,

Z. A. ROGERS

[Endorsed]: Pltfs Exhibit No. 5 Rogers vs. N. Y. Life Case No. Civ-146 Phx marked for identification Apr 22, 1941, admitted and filed Apr 23, 1941 Edward W. Scruggs, Clerk, United States District Court for the District of Arizona by Wm. H. Lovelless, Chief Deputy Clerk. [49]

Mr. Connor: Your Honor please, we would like permission to read this to the jury.

The Court: All right.

(Thereupon Plaintiff's Exhibit 5 was read to the jury by Mr. Connor.)

The Court: All right, proceed.

Mr. Dougherty: Now, after having received this, Mr. Clem, did you have any further conversation over the 'phone or otherwise with Mr. Lindberg concerning the Rogers matter?

The Witness: Yes. Sometime later than that, the latter part of December, as I recollect it——

Q. Let me first ask you this question: Did you receive any money as a result of this order?

A. No—— oh, you mean from the New York Life Insurance Company?

Q. Yes? A. No, sir.

(Testimony of Stanley Clem.)

Q. Nor from Rogers?

A. Not from Rogers, no.

Q. Now, I interrupted your answer. You had a conversation with Mr. Lindberg over the 'phone about the latter part of December, you say, of 1939?

A. Yes.

Q. And that was concerning the Rogers matter.

A. Yes.

Q. Will you state what that conversation was?

Mr. Jenckes: Just a minute. If your Honor please, could we ask a few questions on voir dire?

Mr. Dougherty: This has nothing to do with voir dire.

The Court: Counsel made a statement what he intended to prove.

Mr. Jenckes: No, no. This goes to the question of whether he was talking to Lindberg.

The Court: Go ahead.

Mr. Jenckes: Mr. Clem, how did you happen to have this telephone conversation; that is, did you call Lindberg or did he call you?

The Witness: Which conversation do you mean?

[180]

Q. The last conversation over the telephone that you are referring to in December?

A. I called Mr. Lindberg—I called for him and he wasn't in the office and I left word for him to call me and then he had returned my call.

Q. How did you happen to know it was Mr. Lindberg you were talking to?

A. That is what he said.

(Testimony of Stanley Clem.)

Q. It was just the fact that whoever called you said he was Mr. Lindberg?

A. That is right. He asked me if I called him.

Q. As far as you know, it might have been anybody else in the office up there?

Mr. Dougherty: We object to that as irrelevant, incompetent and immaterial. The man has testified that he put in a call for Lindberg and when Lindberg came in, he called him.

The Court: All right.

The Witness: That would have been possible.

Mr. Jenekes: Your Honor please, we object to any further testimony in connection with the telephone call on the grounds it is——

The Court: The objection is overruled.

Mr. Dougherty: You may state now what the conversation was, Mr. Clem.

The Witness: I began to wonder along about a month or [181] less whether or not Mr. Rogers was getting along all right, and he had written me a letter to be sure and send over to his wife some more money. I admit I had slipped about a week or so on it, and I then wrote him back a letter telling him I would like to have a report on how he was getting along and when I could expect the return of this money, and he wrote me back a letter——

Mr. Jenekes: Now, just a minute, we object to this.

The Court: All right.

Mr. Dougherty: Now, you are speaking of a con-

(Testimony of Stanley Clem.)

versation or some communications you had with Rogers. We are concerned here with the conversation you had over the 'phone with Mr. Lindberg.

The Witness: Oh! Well, I called Mr. Lindberg after I communicated with Mr. Rogers to verify what Mr. Rogers had said to me, that he could not pay this money until he had paid his premium on his life insurance, and Mr. Lindberg told me that Rogers had taken a life insurance policy with the company, but I need not be disturbed about the situation because Rogers had sold quite a lot of insurance and, as I recollect it, he said his premiums would run three or \$400.00 and that I need not be disturbed about it because the New York Life Insurance Company would see that I got my loan.

Q. Well, what was said about the policy, if anything?

A. He told me that it was true, that Mr. Rogers had taken out a policy with the New York Life Insurance Company. [182]

Q. And which was to be paid first, was anything said about it, the premium on that policy or your payments?

A. The premium on the policy had to be paid, as I understood, before I could begin getting my money out of it.

Mr. Jenckes: Your Honor please, we move to strike that last answer on the ground it is what he understood and not what was said.

Mr. Dougherty: In other words, you would not

(Testimony of Stanley Clem.)

receive out of his earnings any money on your account until the policy had been paid, or the premium.

Mr. Jenckes: Just a minute, we move to strike that.

The Court: That is your conversation and not Mr. Lindberg's.

Mr. Dougherty: No.

The Court: Let the witness testify.

Mr. Dougherty: Yes, I am quite willing to let the witness testify.

The Witness: Mr. Lindberg told me over the 'phone I would not get my \$75.00 back until Rogers had paid the premium on his policy. That is the exact conversation, I need not be disturbed about it because he had built up enough premiums there that I could not help but get my money.

Q. What is the reason—— what was your reason for calling Mr. Lindberg concerning——

Mr. Jenckes: Just a minute. We object to that on the grounds it is immaterial. [183]

The Court: Yes.

Mr. Dougherty: You may take the witness.

Mr. Ross: No questions.

Mr. Dougherty: That is all.

The Court: Stand aside. Call your next witness.
(The witness was excused.)

Mr. Dougherty: Mrs. Rogers.

LOIS ROGERS

was called as a witness in her own behalf in rebuttal, having been heretofore duly sworn testified as follows:

Direct Examination

Mr. Dougherty:

Q. Mrs. Rogers, about what was the date of your husband's funeral here in Phoenix?

A. On February 1st, 1940.

Q. Now, do I understand from your previous testimony that his body was brought from Fort Huachuca Hospital to Phoenix?

A. The body was turned over to the mortician in Bisbee and the mortician here received the body from the mortician there when he brought it back.

Q. Mr. Rogers, I understand, had been staying at the Page Hotel in Willcox, Arizona?

A. That is right. [184]

Q. Had you visited the hotel—— strike that. Did he have a room in that hotel?

A. Yes, he did.

Q. Had you visited the hotel or the room, or had you visited the southern part of the State between the time of his death and the time of his funeral?

A. No, I had not.

Q. You had not examined the contents of his room or any of his personal belongings?

A. No, I had not.

Q. Now, on or about that time; that is, directly after the funeral did you have occasion to go to Willcox?

A. Yes, I did.

(Testimony of Lois Rogers.)

Q. And with whom did you go?

A. I went with Mr. Lindberg and my elder son, Gale, and my sister-in-law, Mrs. Miller.

Q. How did you go?

A. We went by car, in Mr. Lindberg's car.

Q. Now during the trip to Willecox, did you have any conversation with Mr. Lindberg concerning this insurance policy involved in this action?

A. Yes, we did.

Q. Will you state as nearly as you can remember what that conversation was?

Mr. Jenckes: Just a minute, if your Honor please. Before she relates that conversation we wish to object to the [185] testimony upon the grounds that there is no evidence here that Mr. Lindberg, at that time at any conversation he might have had with Mrs. Rogers, was acting within the scope of his employment, no showing that any statements he may have made at that time would have been binding upon the New York Life Insurance Company.

Mr. Dougherty: We submit, your Honor, he was in continuous employment and this testimony is as relevant as any testimony could be. He was still the agency director and the manager of the insurance company in this State.

The Court: All right, go ahead.

Mr. Dougherty: Now, will you state what the conversation was?

The Witness: Well, I asked Mr. Lindberg for

(Testimony of Lois Rogers.)

the policy and he said I could not have the policy, that he had it. And I said, "Where did you get it?" He said, "I took it from his room along with other papers belonging to the company", and I said, "You had no right to do that; you did that against my instructions and against my telegram to the hotel to allow no one in that room until my arrival." He said, "I had the right because everything in the room pertaining to the company is now the property of the New York Life Insurance Company, therefore, I had the right to take it and I have it".

Q. Now, state what further conversation there was, if you had further conversation? [186]

A. Well, when I said he had no right to take that and he said he did have a right because it was company property, I said, "Well, isn't it true that you had an agreement of a credit arrangement between yourself and my husband to pay for this premium out of his accumulated earnings?" He said, "Yes, that is the way it was supposed to have been, but unfortunately he died before he was able to pay anything on it". And I said, "I still want the policy, I consider it my property". He said, "Well, I can't give it to you".

Q. He did not give it to you?

A. He did not give it to me.

Mr. Jenckes: Your Honor please, at this time we would like to move to strike all of this testimony upon the ground that the record affirmatively shows

(Testimony of Lois Rogers.)

here that Mr. Lindberg had no authority to extend credit on the issuance of policies, and anything he might have said to her in that respect is not binding upon the New York Life Insurance Company for that reason.

Mr. Connor: There is no such thing in the record, and furthermore——

The Court: Well, I will overrule it now. We can argue that later.

Mr. Dougherty: That is all.

The Court: Do you wish to cross-examine?

Mr. Jenckes: Just a minute, your Honor. [187]

Cross-Examination

Mr. Ross:

Q. Mrs. Rogers, what did Mr. Lindberg state regarding the payment of premiums on this policy?

A. He said—— well, I said, “I understood from my husband that you and he had an arrangement, an agreement to pay this premium out of his accumulated earnings”, and he said, “That was the way it was supposed to have been, but unfortunately he died before he was able to pay anything on it”.

Q. Did you ask Mr. Lindberg whether there had been any earnings on commissions?

A. Yes. I said, “Well, I understand that he was selling a lot of insurance”, and he said, “He is”. His words were, “He is a cracker-jack salesman, but”, he said, “sometimes they are slow coming in.”

(Testimony of Lois Rogers.)

Q. Did he explain to you why there had been no earnings?

A. I don't recall he did.

Mr. Connor: We object to that. I think that is immaterial.

The Court: She may answer.

The Witness: I don't recall that he did other than he said sometimes the premiums are slow coming in.

Mr. Ross: When he told you that Rogers was to pay the premiums out of future earnings, you did not question him regarding whether or not there had been such earnings turned [188] into the company? A. Yes, I did.

Q. And what was his reply?

A. He said there wasn't.

Q. He said there had not been any earnings to the company? A. As yet.

Q. Did he tell you that the premium had been paid? A. No, he did not.

Q. Did he tell you that it had not been paid?

A. Yes, he said that there had been nothing, he had been unable to pay anything on it before his death.

Q. Did he tell you that the policy was ever in force?

Mr. Dougherty: We object to that, calling for a conclusion of the witness. In the first place, it would be a conclusion of Lindberg's.

The Court: Yes.

(Testimony of Lois Rogers.)

Mr. Ross: The objection was sustained?

The Court: Yes. Is that all?

Mr. Ross: That is all.

(The witness was excused.)

Mr. Connor: Call Mr. Gale A. Rogers.

Mr. Dougherty: You Honor please, I have forgotten one question that I wanted to ask Mrs. Rogers concerning this exhibit here. I'd like to recall her to question her concerning this exhibit.

[189]

The Court: All right, we have this boy. You have been sworn?

GALE A. ROGERS

was called as a witness on behalf of plaintiff in rebuttal, and being first duly sworn testified as follows:

Direct Examination

Mr. Dougherty:

Q. Will you state your name?

A. Private Gale Rogers.

Q. You are the son of Mrs. Rogers who is the plaintiff in this case? A. Yes.

Q. And Zeno A. Rogers, deceased?

A. Yes.

(Testimony of Gale A. Rogers.)

Q. On or about the fore-part of February, 1940, did you accompany your mother and Mr. Lindberg, and I believe an aunt of yours on a trip from Phoenix to Willcox? A. Yes.

Q. In Mr. Lindberg's automobile?

A. Yes.

Q. State whether or not you heard any conversations between Mrs.— between your mother and Mr. Lindberg during that trip?

A. Yes. [190]

Q. Will you state the relative positions in which you were seated; who was in the front seat and who was in the back seat?

A. Mr. Lindberg was driving and my mother was in the front seat.

Q. Will you try to speak a little louder?

A. I was in the back seat with my aunt, Mrs. Miller.

Q. Could you overhear the conversation taking place with your mother and Mr. Lindberg?

A. Yes.

Q. You say you did hear such conversations?

A. Yes, I did.

Q. Will you state as nearly as you remember what those conversations were, Gale?

A. Well, my mother asked Mr. Lindberg where the policy was. Mr. Lindberg said he had it, that he had taken it from my father's hotel room. My mother said he had no right to take that and Mr. Lindberg said he took it anyway, and then my

(Testimony of Gale A. Rogers.)

mother asked Mr. Lindberg if it wasn't true that my father was supposed to have paid the policy from his own earnings. Mr. Lindberg said, "Yes, that is the way it was supposed to have been," but my father died before any commissions could come in, and my mother asked Mr. Lindberg for the policy but Mr. Lindberg said he could not give it to her.

Mr. Dougherty: That is all. [191]

Mr. Ross: No questions.

(The witness was excused.)

Mr. Dougherty: May I recall Mrs. Rogers?

The Court: Yes.

LOIS ROGERS

was recalled as a witness in her own behalf in rebuttal, and having been heretofore duly sworn, testified further as follows:

Redirect Examination

Mr. Dougherty:

Q. Mrs. Rogers, I show you Plaintiff's Exhibit 4 and ask you to examine the different documents grouped in there; just look through them?

(The witness complies.)

(Testimony of Lois Rogers.)

Mr. Dougherty: Now, have you seen these papers before, these notes before?

The Witness: Yes, I have.

Q. These are promissory notes, and from whom did you receive them?

A. I received them from someone in the New York Life Insurance Company's office here in Phoenix.

Q. How did you receive them?

A. In a letter.

Q. They were mailed to you?

A. They were mailed to me with a short letter stating [192] they were notes that they had tried to collect on.

Q. You have since had them in your possession?

A. Yes.

Q. Have you ever collected on them?

A. No.

Q. Have you ever tried? A. No.

Mr. Dougherty: We offer these in evidence, your Honor.

The Court: For what purpose?

Mr. Dougherty: For the purpose of showing that he—— Mr. Rogers had premiums—— had commissions coming if these notes were enforced as they might have been by the company. They were taken from his possession, came into the possession of the company in some way and they held them and finally abandoned them, apparently, and turned them back to Mrs. Rogers.

(Testimony of Lois Rogers.)

The Court: Well, how do you know they could have been collected?

Mr. Dougherty: I don't know, but there has been no proof that they could not be.

The Court: Well, I don't think the burden is on the defendant.

Mr. Dougherty: On their face, they are an enforceable contract. That is one purpose. The second purpose, showing that they do take notes; that notes are a part of the credit [193] arrangement which the company makes.

The Court: That is all right. They are payable to Z. A. Rogers. How does the life insurance company collect these notes?

Mr. Dougherty: I think it has been testified by Mr. Caskey that they looked to the agent to collect the notes. Apparently it is just a mechanical arrangement whereby the agent takes the note for the benefit of the company, because ultimately the company must be paid as a result of that note. Those notes were taken for policies that were issued.

The Court: I know, but that was Z. A. Rogers.

Mr. Dougherty: True, but under Mr. Caskey's testimony——

The Court: After his death, how could the company collect these notes?

Mr. Dougherty: Beg pardon?

The Court: After his death, we all know that——

(Testimony of Lois Rogers.)

Mr. Dougherty: That is true, but they had them in their possession.

The Court: All right. Is there any objection?

Mr. Dougherty: I am not quite through.

Mr. Ross: We object, that it would in no way prove that commissions had been earned. It was a personal arrangement between Rogers and the debtors.

Mr. Dougherty: May I be heard further?

The Court: Yes, go ahead.

Mr. Dougherty: All right. I maintain——[194]

The Court: Let me talk a minute. How do we know what those notes were given for as far as those records are concerned? It might be borrowed money.

Mr. Dougherty: No, Mr. Caskey testified——

The Court: He testified about these notes?

Mr. Dougherty: Yes, he testified the same notes were in the office of the New York Life.

The Court: Well, I am not going to argue with you. The objection is sustained. That is all.

Mr. Dougherty: That is all, Mrs. Rogers.

(Thereupon the witness starts to leave the witness stand.)

Mr. Dougherty: Just a moment, just step back there a moment.

Q. Do you have the letters accompanying those notes or do you know where they are?

A. Yes.

Q. I hand you here what appears to be a letter

(Testimony of Lois Rogers.)

from the New York Life Insurance Company by Mr. Caskey to you; two letters, and ask you whether you received those letters through the mail?

A. Yes, I did.

Q. And are those the letters by which these notes in Exhibit No. 4 were transmitted to you?

A. Yes, they are, contains a listing of each note by number. [195]

Q. Do you know the signature of Mr. Caskey?

A. Well, I have never seen him write his name. I suppose that is his signature.

Mr. Dougherty: Will you admit that is his signature, or will I have to call him?

Mr. Ross: Yes, we will admit that is Mr. Caskey's signature.

Mr. Dougherty: All right. We ask to have this marked for identification. I should have done it before.

(Thereupon two documents were marked Plaintiff's Exhibit 6 and 7 for identification.)

Mr. Dougherty: We now offer in evidence Plaintiff's Exhibits 6 and 4 for identification, for among other purposes, showing the fact that the company acts through its agents, accepts notes for payment of the first premium accruing on policies sold by the agents.

Mr. Ross: We object to it, your Honor. There is no relevancy whatever to this action, both the letters or the notes.

Mr. Jenckes: And we further object on the

(Testimony of Lois Rogers.)

ground that the letters don't purport or can't prove the things that they were offered to prove, because they had nothing to do with the company.

Mr. Dougherty: Oh, yes, they identify the notes fully. The letters and the notes check.

The Court: Well, I don't, I can't see the materiality [196] of it.

Mr. Dougherty: We feel, you Honor——

The Court: There isn't any question before the Court or the jury as to whether or not the company did allow their agents to accept notes for first premiums. The question here is whether the deceased was extended credit by the company to take care of his premiums. That is a different proposition.

Mr. Dougherty: Well, there are two ways in which that might be established; one, by special arrangement and the other one by the general business practice of the company. Now, we have maintained——

The Court: I know, but this is not the same thing. I don't think it is proper. The objection will be sustained.

Mr. Dougherty: That is all, Mrs. Rogers.

(The witness was excused.)

Mr. Dougherty: The plaintiff rests.

The Court: Anything further?

Mr. Ross: Yes. [197]

In Surrebuttal

Mr. Ross: Call Mr. Lindberg, please.

ARTHUR F. LINDBERG

was called as a witness on behalf of defendant in surrebuttal, and having been heretofore duly sworn, testified as follows:

Direct Examination

Mr. Ross:

Q. Mr. Lindberg, I hand you Plaintiff's Exhibit 1 and ask you to study it and note where Mr. Rogers name appears in the columns on the sheet, and tell us whether or not the appearance of his name in that exhibit indicates that he had earned any commissions with the company or sent in any premiums to be collected?

Mr. Dougherty: We object to that as not being proper at this time. That is a part of your principal case. It is not rebuttal.

The Court: Well, is that the document that shows——

Mr. Dougherty: It is the circular that was sent out.

The Court: Probably it is not admissible anyway. You can take a dozen applications and never write one policy. If I hear any more about it I will strike it from the record.

Mr. Ross: Was the question answered or shall we strike the question and answer? [198]

The Court: Oh, he may answer.

The Witness: His name only appears in the column showing written applications and, of course, there is no commission earned until the policy is delivered and paid for.

(Testimony of Arthur F. Lindberg.)

Mr. Ross: Mr. Lindberg, when did you last see Mr. Rogers alive?

A. On January 21st, 1940.

Q. Where did you see him?

A. In his hotel room at Willcox, Arizona.

Q. Was anyone present at that time?

A. No, just Mr. Rogers and myself.

Q. Did you at that time know whether Mr. Rogers had applied for a policy with the company?

A. Yes, I knew he had applied for a policy.

Q. Did you know whether he had paid the first premium to the company on the policy?

A. No, I knew he had not, because he had had no—I get a daily report of all paid business and we had received no—this report had never shown his name as containing any paid business.

Q. Did you know at that time whether the policy had been forwarded to Mr. Rogers.

A. No, I did not.

Q. Did Mr. Rogers mention the insurance policy to you at that time?

A. Yes, he asked me, "What about my own policy?" He [199] said, "How long can we hold that without sending it back for cancellation?"

Q. And will you tell us what the conversation was?

A. Well, I told him that if the policy was not settled for within 30 days from the time we received it at the branch office from our home office, that before it could be then delivered he would have an-

(Testimony of Arthur F. Lindberg.)

other examination at his own expense. "Well," he said, 'he would not worry about that, because he had given the doctor or the examiner in Willecox so much business he knew the doctor would make his second examination in that event without any extra charge,' and he said, 'it would probably be another 30 or 60 days before he would be in a position to pay the premium on it.'

Q. When you learned of Mr. Rogers death, did you communicate with Mrs. Rogers.

A. Mrs. Rogers communicated with me. I received a telegram on Saturday, January 27th, that he had been injured in an automobile accident and then I immediately communicated with her and informed her of what had happened and the following day, which was Sunday, January 28th, she 'phoned me and advised me of his death.

Q. At that time was the insurance policy in question mentioned?

A. Yes. Mrs. Rogers asked me what about the policy that Mr. Rogers applied for, and I replied that the policy had been issued, but that he had made no payments on same and [200] for that reason it was not in effect.

Q. Was anything further said at that time regarding the policy?

A. Well, in fact, I told her that in the case of a policy on the agent's own life, we didn't even send the policy to the agent, it is held in our office——

(Testimony of Arthur F. Lindberg.)

Mr. Dougherty: Wait a minute, will you read the last question?

(The last question and answer was read by the Reporter.)

The Court: Go ahead, is that all?

The Witness: That was the full conversation relative to the policy as I recall it.

Mr. Ross: When did you next talk with Mrs. Rogers after that?

The Witness: In regard to the policy?

Q. No, when did you see her next?

A. I saw her on the following Monday evening prior to my making a trip to Willcox. She was having dinner at a friend's house that evening and I went to see her at that time to tell her I was going down to Willcox to get the company's papers that were in Mr. Rogers' room, and my purpose in going to see her was to see if she wanted me also to bring back his personal effects, his clothing and things of that kind that were in the hotel room, and she told me, 'No, I should leave those, that she would go down and get [201] those things herself'.

Q. After the funeral, did you make a trip to Willcox with Mrs. Rogers, her son and her sister?

A. Yes, I did, on February 2d.

Q. Did Mrs. Rogers at any time on that trip ask you about this policy?

A. No, she did not, outside—— the only discussion there would have been on that trip was, I might have perhaps said, "It is unfortunate that

(Testimony of Arthur F. Lindberg.)

the policy that he had applied for in our company was not also in effect". There was considerable discussion about the policy he held in another company.

Q. Did you discuss whether or not Zeno Rogers had earned any commissions——

Mr. Dougherty: Just a moment, we object to that line of questioning as leading. You have already asked this witness several times what the conversation was and apparently when you don't get the response you want, you ask him further. We object to it as leading.

The Court: It is not confined to that, counsel, alone. Go ahead.

(The question propounded by Mr. Ross reading: "Did you discuss whether or not Zeno Rogers had earned any commissions——" was read by the Reporter and the question was finished as follows:)

Mr. Ross: ——and that any money was owing by the [202] company?

The Witness: I don't think there was any discussion of that nature on that trip, because I had had several telephone conversations prior to Mr. Rogers' death, in which she had inquired of me as to when he was going to get some commissions, and I told her that while he had written several policies, none of them had been paid for and, therefore, no commissions were due.

Q. Did you discuss any other insurance policies on that trip?

(Testimony of Arthur F. Lindberg.)

A. Yes, we discussed the policy that Mr. Rogers held in another company.

Q. What was the substance of the conversation?

Mr. Connor: We object to that as being immaterial. What has another policy got to do with this case? It is immaterial, irrelevant and incompetent.

The Court: Well, I don't think it would have anything to do with this case.

Mr. Ross: Well, we are merely showing there was a question as to whether or not the other policy would be paid because of a possible suicide, and the question in regard to the New York Life policy was never mentioned and brought up.

The Court: That is what he said. He said there wasn't very much said about this policy. What was said about another policy and a hundred other things that they [203] talked about on the trip would not be material.

Mr. Ross: Did Mrs. Rogers mention this insurance policy to you at any time subsequent to this trip to Willcox?

The Witness: The policy on Mr. Rogers own life you are referring to?

Q. I am referring to the policy on Rogers life?

A. Yes, she came into my office, I believe, in the early part of March, and asked me, "Where is the policy on Mr. Rogers life, I am going to bat on it?"

Q. And what was the substance of your conversation with Mrs. Rogers?

A. I replied to her question that there was no

(Testimony of Arthur F. Lindberg.)

one felt any worse about the policy not being in effect than I did, but the fact remained that there had been no premium paid and, therefore, the policy was not in effect, and I told her that if she did intend to take it to Court, I would advise that she take it on a basis where the attorneys in question would have no fee unless they were able to collect on the suit. That was my suggestion to her and that ended our conversation in regard to the policy.

Q. Did she ask for the policy at that time?

A. She did not ask for the policy, she asked, "Where is the policy, I am going to bat on it?"

Q. Did she ask at that time or on the trip to Willcox what she would have to do to collect on the policy? [204]

A. She did not.

Q. Do you now, or have you ever had authority as an agent for the New York Life Insurance Company to enter into any sort of a credit arrangement regarding the payment of premiums issued on insurance policies?

Mr. Dougherty: We object to that as calling for a conclusion of the witness. We do not think that the power of authority or privileges or scope of authority of the agent can be testified to directly by himself and that is not the way in which the powers of an agent is established.

The Court: He may answer.

The Witness: I have no authority whatever to extend credit arrangements of any kind to anyone.

(Testimony of Arthur F. Lindberg.)

Mr. Ross: Have you ever entered into such a credit arrangement? A. I have not.

Q. Did you ever enter into such a credit arrangement with Rogers? A. I had not.

Mr. Ross: That is all.

The Court: We will take our morning recess now, gentlemen. Keep in mind the Court's admonition.

(Thereupon a short recess was taken, after which all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Dougherty: Mr. Lindberg, I think was on the stand. [205]

Mr. Jenckes: We have nothing further on direct.

ARTHUR F. LINDBERG

resumed the witness stand and testified further as follows:

Cross-Examination

Mr. Dougherty:

Q. Mr. Lindberg, directing your attention now to the period during which Mr. Rogers was employed, I want to ask you if, in all instances where policies were written, the premium—the first premium on the policy was prepaid before the policy was delivered?

A. No, as has been brought out in testimony before.

Q. Your answer to that question is "no"?

(Testimony of Arthur F. Lindberg.)

A. No. Sometimes policies are delivered without the premium being paid in cash.

Q. So that you do deliver policies on credit?

A. To people other than agents of the company.

Q. You just made your own rule along that line?

A. That has been the company's established rule for the 17 years——

Q. Did you ever call Mr. Rogers' attention to any rule of that kind? A. Yes, definitely.

Q. You did? When and where?

A. One time at Willcox when I saw him on the 21st day [206] of January.

Q. Did you call Mr. Clem's attention to that when you had a conversation with him?

A. I had no conversation with Mr. Clem regarding Mr. Rogers' policy at any time.

Q. In general, when he called you up, you informed him, did you not, that his re-payment would have to be deferred until the policy——

A. No, I did not.

Q. You didn't have any such conversation?

A. I had no such conversation with him.

Q. None at all, but you do take notes, then, in payment of premiums?

A. The agents are permitted to take notes payable to themselves when they deliver a policy to the applicant, other than an agent of the company.

Q. That is the arrangement you have, whereby you hold the agent responsible for the collection of the premium, isn't it?

(Testimony of Arthur F. Lindberg.)

A. Yes, that is correct. If the note is not paid by the applicant, the agent has to pay the note.

Q. Nevertheless, the policy is sold on credit?

A. You might call it that, as far as the agent is concerned. As far as the company is concerned—

Q. Yes. you say you didn't know, on the 21st of January, you didn't know that Mr. Lindberg had the policy? [207]

A. That Mr. Rogers had the policy?

Q. Or Mr. Rogers had the policy?

A. No, I did not. Had I known, I would have taken it back with me.

Q. You said you discussed the policy?

A. Yes.

Q. And it never occurred to you to ask where the policy was at the time?

A. I naturally assumed it was in the office as in all other cases on the policy on an agent's own life.

Q. You have complete control of the office, don't you?

A. Oh, no. I have—— I could not possibly perform my other duties if I had to check up and see where every policy was. We handle quite a few policies.

Q. You have general control of the office, do you not?

A. I am supervisor of the office. I do not have a great deal to do with the cashier's office. That is the cashier's position. He does a pretty good job of supervising it so I don't pay attention to it.

(Testimony of Arthur F. Lindberg.)

Q. The policy was sent out under Mr. Caskey's—

A. Or under his supervision.

Q. Did you inquire whether this policy had been sent to Mr. Rogers? A. No, I did not.

Q. Yet, you say you had a conversation with him on the 21st day of January, where the policy was discussed but you [208] did not question him as to where the policy was?

A. No. Naturally, I knew the policy had been issued and I assumed we were holding it in the office; that is, we usually did in a case of a policy on an agent's own life.

Q. You say you told him that?

A. The question didn't come up at that time.

Q. Notwithstanding you were discussing the policy, the question didn't arise where it was?

A. No.

Q. Are you familiar with the reports that come into your office from the agents, Mr. Lindberg?

A. I usually don't see those reports. They are handled by the cashier. I am familiar with the reports, I know what they are and know their purpose.

Q. Now I show you Defendant's Exhibit D dated January 15th and call your attention to the fact that the report shows that Mr. Rogers was then holding that policy, doesn't it?

A. Yes. It states here, under "Remarks" — "State date we may expect to receive payment of premium or any other information of importance",

(Testimony of Arthur F. Lindberg.)

and under the heading of "Remarks", he makes no memorandum.

Q. Never mind that, your counsel can bring that out. The fact is, that this report was made on the 15th of January to your office?

A. No, we sent it out to him from our office on [209] January 15th.

Q. Yes, and you got it back within a few days afterwards, didn't you?

A. It was received on January 23d by our branch office.

Q. Was it in the office at the time you had this conversation with him?

A. No, I had the conversation with him on January 21st, and this date received stamp shows "January 23d".

Q. That is your stamp?

A. He had evidently filled it out and mailed it on the 20th, because that is when it was dated.

Q. According to that, then, this report was mailed the day before you had the conversation?

A. Yes, I would assume so.

Q. The report is dated January 20th, is it not?

A. That is right, and I assume it was mailed on that day.

Q. Did you ever send Mr. Rogers a communication of any kind concerning the rule with respect to the delievry of policies to agents?

A. No, that was discussed with him verbally.

Q. You have no record of such a communication?

(Testimony of Arthur F. Lindberg.)

A. No, I have not. But, at the time he was here—

Q. Now, your counsel can bring out whatever you want. I wanted an answer as to whether you had such a communication with him? [210]

A. I had no communication. I discussed it with him verbally.

Q. And, notwithstanding—when did you discuss it with him verbally?

A. At the time he was here over in the Christmas holidays.

Q. What date did you talk to him?

A. I don't exactly recall the date. It might have been Christmas Day. I was up at the office and he came in to see me when he came up from Willcox.

Q. Will you say you saw him at any time during the time he was here Christmas?

A. Yes, I saw him during the time he was here Christmas.

Q. What day do you say it was?

A. I can't recall as to the exact date. It was sometime during the Christmas holidays.

Q. Was it Christmas Day?

A. It might have been. It was a holiday, I know that. It was either Sunday or Christmas Day, because I was up at the office finishing up some work that I had to do there in the office. There was no one else around the cashier's office or anything.

Q. Yes, and that was after the policy had been delivered to him?

(Testimony of Arthur F. Lindberg.)

A. No, it was prior to the time the policy had been delivered to him, because we mailed the policy to him on the [211] 29th of December. The policy was not in his possession at the time we had that discussion.

Q. Just what was that discussion?

A. Well, he wanted to know what about his policy, how he could arrange to settle for it and things of that kind, and I told him that the company did not take notes on policies on agents own lives.

Q. Was anybody present during that conversation?

A. No, he and I were in the office alone.

Q. And notwithstanding that fact, the policy was sent to him? A. I presume it was.

Q. And you had a conversation almost a month later and you still did not discuss the fact that he had the policy?

A. I don't know. It never came up.

Mr. Dougherty: That is all.

The Witness: I naturally assumed it was in our possession as it should have been.

Redirect Examination

Mr. Ross:

Q. Mr. Lindberg, are the agents of the company given any written instructions regarding whether or or not the company will accept notes?

A. Yes. That is contained in a booklet called "Instructions to agents". [212]

(Testimony of Arthur F. Lindberg.)

Q. I will show you Defendant's Exhibit No. F and ask you if you will point out where——

Mr. Dougherty: We submit the pamphlet he has in his hands speaks for itself.

Mr. Ross: I merely asked him to point out——

Mr. Dougherty: Well, you can point it out to the jury.

The Court: Oh, he can find it. Wasting time.

The Witness: Should I read the——

The Court: Yes, read it.

Mr. Ross: Yes, if you will read it please?

The Witness: On page 6, under section 12 headed "Notes"—"The company will not accept a note in payment of the whole or any part of the first premium on a policy. The company will accept cash only in payment of a first premium. If an agent takes a note, he does so at his own risk and must be personally responsible for same. Agents are instructed not to issue a coupon receipt attached to an application in exchange for a note or for anything except cash."

Q. Was Mr. Rogers given a copy of this set of instructions?

A. Yes, he was at the time he signed his contract papers.

Mr. Dougherty: May I see that when you are through with it?

(The document was handed to Mr. Dougherty.)

(Testimony of Arthur F. Lindberg.)

Mr. Dougherty: On what page, do you remember?

Mr. Ross: On page 6.

The Witness: 6.

Recross-Examination

Mr. Dougherty:

Q. Now, Mr. Lindbergh, this provision reads as follows:

“The company will not accept a note in payment of the whole or any part of the first premium on a policy. The company will accept cash only in payment of the first premium. If an agent takes a note, he does so at his own risk and must be personally responsible for same. Agents are instructed not to issue a coupon receipt attached to an application in exchange for a note or for anything except cash”.

Now, withstanding this provision, you do deliver policies without the pre-payment of the first premium, don't you?

A. Where the agent takes the note payable to himself.

Q. Yes, but notwithstanding the provisions here, you do deliver your policy?

A. The agent delivers the policy in exchange for the note made payable to himself.

Q. What is the difference, Mr. Lindberg, whether you deliver them through the agent or himself?

(Testimony of Arthur F. Lindberg.)

Mr. Jenckes: Well, that is argumentative.

Mr. Dougherty: Yes, that is true, it is argument, but [214] it is arguing with the arguer.

The Court: You can argue that to the jury.

Mr. Dougherty: It is true that the agent takes a note to himself. He does that to protect himself, does he not?

The Witness: Yes, naturally.

Q. Because you look to him for the payment of the premium, don't you? A. Yes.

Q. You extend credit to the agent, that is right, isn't it?

A. Yes, where the applicant is someone other than an agent of the company.

Q. Well, it does not say anything about that in here, does it? A. I don't know.

Q. I will ask you to examine it and see if you find anything (handing document to witness)?

A. I am quite sure there is nothing in here that says anything about that.

Q. No, I felt sure there was not. The fact is, that notwithstanding your written instructions there you constantly waived that and delivered the policies without the payment of premium?

Mr. Jenckes: We object to that on the ground it has been asked and answered two or three times.

The Court: Twenty-three times. [215]

Mr. Dougherty: Now, Mr. Lindberg, this policy that is being sued on here is similar to policies you

(Testimony of Arthur F. Lindberg.)

issued on insurance under the same circumstances continuously, is it not?

The Witness: Yes, except that particular policy had an aviation exclusion clause.

Q. And this policy contains substantially the same provision that we have just been speaking of?

A. How do you mean?

Q. This policy provides that this contract of application—no, this contract is made in consideration of the application therefor and of the payment in advance of the sum of \$40.50, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this policy for the period terminating on the 19th day of June, 1940, and of a like sum in said date and every six calendar months thereafter during the lifetime of the insured?

A. Yes, that phraseology is the same that is contained in all of our policies.

Q. And substantially the same is contained in here, in this pamphlet?

A. I don't think there is anything pertaining to that in the pamphlet.

Q. Well, in both there is a provision that the policy will not be delivered until the payment is pre-paid, the premium is pre-paid? [216]

A. Yes, but they make exception there that the agent can take a note.

Q. And you make the same exception when you deliver the policy, notwithstanding this provision in here, in this policy, that the policy is not to be de-

(Testimony of Arthur F. Lindberg.)

livered until the premium is pre-paid, you do deliver policies under your practice and did so at the time Mr. Rogers was engaged, didn't you?

A. The agents delivered the policies at times on a note for the first premium made payable to themselves.

Q. Will you please examine the marked portion of this letter, Mr. Lindberg (handing document to the witness). It is on the first page, just the marked portion?

A. (Examining document) Yes.

Q. Now, in this letter of January 23d, 1940, written by Mr. Caskey to Mr. Rogers, this language is used: "The policy issued on your life was forwarded to you in error as until settlement of the first premium has been made in cash we are not permitted to forward a policy to an agent on his own life. Therefore, will you please see that the policy is returned to the office at once to be held until you can make settlement of the first premium."

That was written to Mr. Rogers?

A. Yes.

Q. And what you wanted to do is to get it back in your hands until he could pay the premium?

[217]

A. That is correct.

Q. There was nothing said there that it had been sent without pre-payment of cash? You wanted to fortify yourself by getting the policy back in your hands?

(Testimony of Arthur F. Lindberg.)

A. Well, naturally, the office made an error in sending it out in the first place.

Q. That is what you said?

A. We were to get it back.

Q. You said nothing in this letter concerning the waiver, did you? A. What waiver?

Q. This airplane waiver? A. No.

Q. And you said nothing to him about the policy being ineffective, did you?

The Court: The letter speaks for itself, you don't have to say anything it does not say.

Mr. Dougherty: Oh, that is true. That is all.

Redirect Examination

Mr. Ross:

Q. Is that letter to which Mr. Dougherty was referring the original of the letter that was sent to Mr. Rogers?

A. Yes, that is the original copy.

Q. Will you explain how the original happens to be in the possession of the New York Life Insurance Company? [218]

A. That was sent to us among other papers that were taken out of his car by the officer at Fort Huachuca and mailed to us in a large envelope.

Mr. Ross: That is all.

Mr. Dougherty: No questions.

(The witness was excused.)

The Court: Anything further?

Mr. Ross: Nothing further here. They say they rested?

The Court: I don't know whether this is surrebuttal or rebuttal.

Mr. Ross: We rest.

The Court: Does everybody rest? Do you rest?

Mr. Dougherty: Yes.

The Court: All right.

Mr. Ross: At this time, your Honor, we would like to make a motion in the absence of the jury.

The Court: All right, you may retire from the court room.

(Thereupon the jury was excused from the court room.)

Mr. Ross: Your Honor, we request at this time that the jury be instructed to return a verdict for the defendant, and we make a motion to that effect. This motion is predicated on three points. The first is that there has been no evidence that any premium has been paid on this policy in question or that there was any waiver of a premium; the second point is, that there is no evidence that [219] the policy was delivered. In fact, the only evidence is to the effect that it was forwarded to him through inadvertence and mistake, and the third point is that it has been shown by the evidence that there is no authority on the part of Mr. Lindberg, or any other agent in Arizona, to waive the payment in cash or the premium due on this policy, and also

Mr. Rogers was advised of the limitations of the agents' authority.

Now, on the question of the evidence, the only scrap of testimony on which the plaintiff might rely would be Mrs. Rogers' testimony relative to her conversations with Mr. Lindberg, and also her son's testimony. You will remember that they testified that Lindberg told them that there had been an agreement that Rogers should pay the premiums due on this policy out of his commissions. Now, the evidence conclusively shows that there were commissions earned. There is no showing that the payment of the premiums out of the commissions was waived; in fact, there is no showing that the policy ever went into effect.

Now, on the question of delivery, the application provides that—it reads, as follows:

“That the insurance hereby applied for shall not go into force unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime——”.

Now, the delivery is purely a question of intention and [220] there is no legal delivery when the policy inadvertently is parted with. Here, there was no intention on the part of the company that this policy should ever have an effective delivery and for that reason there is no showing on the part of the plaintiff that the policy ever went into effect or that this provision of the application was complied with.

Now, even if the plaintiff argues that the testimony relative to Lindberg's admissions might be twisted around or interpreted to the effect that there was some sort of a credit arrangement between Lindberg and Mr. Rogers, nevertheless, it has been clearly shown that he had no authority to enter into such an arrangement so as to bind the company. The application states that the premium has to be paid before the policy goes into effect. It also states that certain designated officers of the company have authority to waive those terms in the application. Furthermore, the instructions which were given to every agent states that cash has to be paid in order to comply with the company's requirements regarding the premium payments. There is nothing which would support any argument that Lindberg was authorized by that credit arrangement to bind the company.

Now, we have cases to the effect that an agent is not authorized to deliver a policy on an insured's oral promise to pay, or anything like that so as to waive the usual requirements of which the insured is given notice. We have cases to the effect that the requirement of delivery must be [221] complied with and delivery is purely a question of intention on the part of the parties.

Mr. Connor: If your Honor please, we believe, of course, that there is evidence of the waiver by this general manager, and we have cases, of course, to show that the general manager may, or the general manager of the company may waive the pro-

visions of this policy notwithstanding its strict terms, and we are certain that there is direct evidence in here by admission against interest on the part of Mr. Lindberg and which is corroborated that some sort of an arrangement had been made, and we can show your Honor cases to the effect that waiver may arise and may be shown by the facts and circumstances of a particular transaction, and that waiver oftentimes arises by expression and sometimes more by implication, and the implication in this case contained in the conversations are in the evidence as to conversations between Mr. Lindberg and Mrs. Rogers and overheard by Gale Rogers, to the effect that some arrangement had been made, and if the arrangement had been made, we think it is immaterial whether or not he had earned commissions in the future to pay. The mere fact he had earned commissions is beside the point. He rather indicated to Mr. Clem and to others that he thought this gentleman was a good salesman. There is evidence in the record to show that at least the man started out with a fairly good record for a new man and it can very well be implied and inferred that [222] those men suspected that he was going to be such a caliber of salesman that probably he would earn commissions to pay his premiums in the future.

Of course, the matter of intention is a matter of construction upon their part. There is no evidence here of a mistake with reference to a mistake contemplated by the law that there should be mutuality

in the mistake. They are attempting to profit by their own mistake, and I don't believe that evidence to show a unilateral mistake would be sufficient to take this case away from the jury.

True, there is no direct evidence of payment, which we assert and can show by our cases that it is necessary when there has been no credit arrangement made. Throughout the testimony of both Mr. Caskey and Mr. Lindberg, they had asserted that there are instances where these policies are delivered without strict compliance with the rules of the company. There is no evidence to show any communication had been given to Mr. Rogers, for instance, to the effect that policies were not delivered to an agent on his own life without the acceptance of cash premium in the first instance. Neither is there any indication that there was a fair opportunity for Mr. Rogers to have answered that letter which was sent to him on the 24th, and he being injured in this automobile accident on the 26th. We might well infer that he probably could have answered that letter with the **direct statement that** credit arrangement had been made between [223] himself and the general manager of this company, from whose title one might imply from every process of reasoning that he had the right to waive the payments on these policies, and we have ample authorities to show.

(Further argument.)

Mr. Dougherty: I would like to add a word, if I may. In this matter, your Honor please, briefly

stated, Rogers, Mrs. Rogers says, in his lifetime Rogers applied for and received a policy on his life, and while he had not paid the first premium on it, he had made arrangements whereby he might pay the premium out of his earnings. On the other hand, the defendant says it is true that he applied for the policy and received it and it was delivered to him, "but we should not have delivered it to him, and, furthermore, he did not sign a certain waiver".

We are here concerned by reason of the motion before your Honor on the question of whether there is sufficient evidence to go to the jury with respect to our right to enforce this policy. The evidence shows that notwithstanding company declarations that the policy will not be delivered until the premium is pre-paid, that they customarily and continuously delivered these policies without the pre-payment of the premium. Not only in Mr. Rogers' case but in their regular—— in the regular course of their business. I would not venture to say how many of their policies, but apparently a great majority of their policies [224] are delivered without the pre-payment of the premium, so that we may well say that the provision for the pre-payment of the premium is constantly waived by the company.

Now, in this case we may stand on the proposition that in the ordinary course of their business the company waives that requirement. Furthermore, that we had a special agreement whereby credit was

extended to us. Now, the truth of it is, that had Mr. Rogers lived and everything gone well, that policy would have been paid for and the company would not have been worried about it, nor would they stand on technicalities whether or not he did pay the premium or how he was to pay it.

There can be no doubt in your mind or the minds of the jury that Mr. Clem was logically connected with this transaction, and that he received an order for the payment of his money and that subsequently he had a conversation with Lindberg, and that conversation would indicate that Mr. Lindberg recognized the contract, that the requirement for the prepayment of insurance might be waived because he entered into an agreement with Mr. Clem concerning it, so that in conclusion we have a situation where Mrs. Rogers seeks to enforce this policy because she says it was delivered to him regularly, he received it; it was in his possession when he died, and on its face it says, provides for the acknowledgement of the payment of the premium, whether by cash or otherwise, it doesn't make any difference, [225] and it is wrongfully taken from her possession, that her husband had made arrangements for credit and certainly, the jury is entitled to pass on that question.

The Court: Yes, I think so. Call in the jury.

(Thereupon the jury returned into the court room and took their positions in the jury box.)

The Court: We will suspend until one-thirty, gentlemen. Keep in mind the Court's admonition,

and keep in mind to come back at one-thirty, rather than two.

(Thereupon a recess was taken at 11:45 o'clock A. M.)

1:30 o'clock P. M., April 23d, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed with the argument. Each side may have thirty minutes.

(Thereupon closing arguments were made to the jury by counsel for the respective parties, after which the Court instructed the jury as follows:)

THE COURT'S CHARGE TO THE JURY

The Court: It now becomes the Court's duty, gentlemen, to instruct you as to the law that applies to this case, the issues that are not at all involved.

You will recall the plaintiff seeks to recover \$4,000.00 [226] upon a policy of insurance issued by defendant company upon the life of her deceased husband. It is not disputed that this policy was in the possession of assured at the time of his death. However, defendant claims the first premium had not been paid on the policy, that it was mailed to Mr. Rogers through error and, therefore, is not an enforceable contract. Plaintiff does not contend that the first premium was paid in cash, but claims that payment in cash had been waived, and that it was agreed between Mr. Lindberg and her husband that payment could be made out of the commissions or earnings of deceased. The company, of course, denies such agreement was made.

You are instructed that if you believe from the evidence that prior to and up to and including the date of delivery of the life insurance policy sued on herein—I will say, rather the mailing of the life insurance policy sued on herein, the New York Life Insurance Company voluntarily and knowingly held Arthur F. Lindberg and David F. Caskey out to the world as its agency directors for the State of Arizona, and as authorized to supervise, direct and control the said company's life insurance business within said State of Arizona, and to permit, authorize or direct the delivery of life insurance policies similar to the one herein involved without the pre-payment of the first premium, or any premium thereon, and had so conducted itself in this regard, as to reasonably justify the public generally, and those [227] dealing with it, in believing that the said Arthur F. Lindberg was authorized, permitted or directed to deliver, permit or cause to be delivered similar policies, and that the policy herein involved was received and accepted by the said Zeno A. Rogers, believing that the said Arthur F. Lindberg had authority to so deliver said policy without the pre-payment of premium, then the New York Life Insurance Company, in the absence of some reason or cause deemed sufficient in law, would be bound by the acts of the said Arthur F. Lindberg.

You are instructed that either by contract or by operation of law the said Arthur F. Lindberg, as agency director, the said David F. Caskey, as agency

cashier for the State of Arizona, and/or any other persons employed in said agency office, charged with the duty of handling, controlling, mailing or delivery of insurance policies within the scope of their employment are regarded as agents of the defendant company; and you are further instructed that such persons as agents could bind the defendant company within the limits of the authority with which they, or any of them, apparently were clothed, in respect to the subject matter of his agency, and for the protection of innocent third persons.

The authority of an agent is enlarged by implication when the principal permits the agent to do acts not expressly authorized and if, through inattention or otherwise, the defendant company suffered its agents, or any of them, to [228] act beyond his, or their authority without objection, then the company, in the absence of some reason or cause deemed sufficient in law, is bound to those who were not aware of any want of authority, to the same extent as if the requisite power had been directly conferred.

You are instructed that if you find from the evidence that the policy sued on herein was mailed to, and received by the said Zeno A. Rogers previous to the time of his death, or that said policy was found among the papers of the said Zeno A. Rogers after his death, and that said policy acknowledged the payment of the first premium, then such delivery, possession and acknowledgment constitute *prima facie* evidence of a binding contract of in-

surance, and the burden of proof falls upon the defendant company to establish by evidence some reason regarded by the law as good and sufficient, why the plaintiff should not recover judgment in this action.

You are instructed that the application for life insurance policy signed by Zeno A. Rogers and said life insurance policy issued in connection therewith are to be construed together, and if you find from the evidence that the said Zeno A. Rogers, in his executed application, waived all benefits of his insurance policy in case of an accident in connection with aircraft, then you are instructed that the signature of Zeno A. Rogers to the so-called permanent aviation clause proposed for his further signature, was not [229] essential to constitute an enforceable life insurance contract; and if you find all other necessary facts in favor of the plaintiff, you are instructed that the plaintiff is entitled to recover in this action, notwithstanding any such failure, if such you find, on the part of Zeno A. Rogers to sign said permanent aviation clause previously to the delivery to him of said insurance policy.

You are instructed that if you find from the evidence that at any time previous to the death of Zeno A. Rogers, the defendant, acting in this behalf by its proper authorized officers agreed expressly or by implication that Zeno A. Rogers might pay the first premium due on the policy herein involved, out of his commissions or future earnings, then you

are further instructed that such an agreement could not be rescinded or terminated by the defendant after the death of the said Zeno A. Rogers without the consent of Mrs. Rogers, the beneficiary, named in the policy.

The Court instructs you that an insurance policy may be issued and signed by the defendant company and still be inoperative for want of delivery, for the application signed by Rogers provided that the insurance should not go into effect unless and until the policy was delivered. The question of delivery is always one of intention. Consequently, if you find that the defendant company forwarded the policy to Zeno A. Rogers by mistake and without the intention of parting with possession of it, then there was no [230] delivery of the policy and your verdict must be for defendant.

It is provided in the application which Zeno A. Rogers made for the insurance policy in question that the insurance applied for should not go into effect until the first premium was paid in full during the insured's lifetime. The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence that Zeno A. Rogers paid the first premium to defendant, unless you find that credit for said premium was extended to Zeno A. Rogers by Lindberg while acting within the scope of his employment.

The burden is cast upon the plaintiff to establish affirmatively by a preponderance of the evidence the allegations of her complaint. You are instructed

that by "preponderance of evidence" as used in these instructions, we mean that degree or quantum of evidence which causes the mind of a reasonably prudent person to lean to one side of a proposition as against evidence opposed to it. It is evidence which is more convincing, more weighty than evidence opposed thereto.

You are made by law the sole judges of the credibility of the witnesses and the weight to be given their testimony. In determining the credibility of the witnesses in this case, you have the right to take into consideration the manner and appearance of the witnesses in giving his or her testimony, his or her means of knowledge of the facts in which he [231] or she testified; any interest he or she may have shown, and the probability or improbability of the truth of his or her statements when considered in connection with all other evidence in the case.

If you believe that any witness has willfully testified falsely to any material fact, then you have the right to wholly disregard the testimony of such witness except insofar as the same may be corroborated by other credible evidence in the case.

When you retire to your jury room you will select one of your number to act as foreman and proceed with your deliberations. If you agree upon a verdict, you should have it signed by your foreman and return it to open court. Any verdict agreed upon must be unanimous.

Two forms of verdict have been prepared for your guidance. Omitting the title of the court and

cause, they read: "We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff." "We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the defendant", and have it signed by your foreman on whichever verdict you agree upon.

Swear the bailiff to take charge of the jury.

(The Bailiff was sworn and the jury retired from the court room in his custody.)

The Court: Are there any exceptions to the instructions [232] as given?

Mr. Ross: The defendant objects to plaintiff's instruction number 1 on the ground that the evidence shows that Zeno A. Rogers had actual knowledge of the limitations of Lindberg's authority and, consequently, the question of the scope of his apparent authority has no application here. Further, there is no evidence that Lindberg or Caskey were authorized to deliver an insurance policy similar to the one here involved without a pre-payment of the first premium.

Defendant further objects to this instruction on the ground it is an incorrect statement of the law and its application to the facts of this case.

Defendant objects to plaintiff's instruction number 2 on the same grounds as set forth in the objections to the previous instruction, and on the further ground that it is vague and unrelated to the facts in the case.

Defendant objects to plaintiff's requested instruction number 3 on the ground that the burden of proving delivery of the policy rests with the plaintiff and is not changed by the fact that plaintiff was initially aided by its presumption of law arising from the insured's possession of the policy.

Defendant further objects on the ground that a presumption such as this is not to be construed by the jury as evidence. The portion of the instruction relating to "some reason regarded by the law as good and sufficient" is vague, [233] and the last phrase of the instruction is an incorrect statement of the law.

Defendant objects to plaintiff's requested instruction number 4, on the ground that it is an incorrect statement of the law as applied to the facts of this case. The defendant company had the right to modify its insurance policies in whichever way it felt good business practice required.

Defendant objects to plaintiff's requested instruction number 6 on the ground that it has no bearing to any of the issues in this case, and on the further ground that it is an incorrect statement of the law as applied to the facts of said case.

Mr. Dougherty: Are you through, Mr. Ross?

Mr. Ross: Yes.

Mr. Dougherty: The plaintiff objects to both instructions requested by the defendant, for the reason that the instructions assume a state of facts not established, that they are not applicable to the facts as developed in the trial of this case and are

not a statement of the corrected rule of law applicable to the facts developed from the trial of this case.

Mr. Ross: Note an exception.

Mr. Dougherty: Note an exception.

(Thereupon the trial was ended.) [234]

I, hereby certify, that the proceedings had and evidence given upon the trial of this cause is contained fully and accurately in the shorthand notes taken by me of said trial, and that the foregoing 159 typewritten pages contain a full, true and accurate transcript of the same.

LOUIS L. BILLAR

Official Shorthand Reporter.

[Endorsed]: Filed July 17, 1941. [235]

[Endorsed]: No. 9892. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Lois Rogers, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed August 11, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 9892

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND AP-
PELLANT'S DESIGNATION OF PARTS
OF RECORD

Comes now the appellant, New York Life Insurance Company, by its attorneys, Ellinwood & Ross, Jos. S. Jenckes, Jr., and Everett M. Ross, and pursuant to Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit states that the following is a concise statement of the points on which it intends to rely on the appeal of the above entitled action:

I

The trial Court erred in denying defendant's motion at the close of all the evidence to instruct the jury to return a verdict for defendant. Said motion should have been granted for the following reasons: (a) The evidence disclosed that there was no legal delivery of the life insurance policy

involved in this action and that no payment of the first premium was ever made thereon, which said acts were by the terms of the policy conditions precedent to its becoming effective; (b) The evidence disclosed that the application for the insurance policy on which this action was based was rejected by defendant's making a counter-offer to applicant which said counter-offer was not accepted by applicant.

II.

The trial Court erred in certain particulars of its general charge to the jury, namely, in giving plaintiff's instructions No. 1, 2, 3, 4 and 6. The defendant specifically excepted to said instructions at the time and the grounds for said objections are set forth at pages 158 and 159 of the Reporter's transcript of record on file herein.

III.

The verdict and judgment were not justified by the evidence and were contrary to law in that there was no evidence that a contract of insurance was ever entered into between defendant and Zeno A. Rogers, the applicant.

DESIGNATION OF PARTS OF RECORD

Appellant thinks that the parts of the record which it designated in the Designation of the Contents of Record on Appeal which it filed in the District Court of the United States for the District of Arizona are necessary for a consideration of the

aforesaid points and appellant therefore adopts said designation.

Dated this 15th day of August, 1941.

ELLINWOOD & ROSS

JOS. S. JENCKE, JR.

EVERETT M. ROSS

Attorneys for Appellant

Received copy this 14th day of August, 1941.

DOUGHERTY and CHANDLER

By ALLIE MAE TALLEY

Attorneys for Appellee.

[Endorsed]: Filed Aug. 15, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF
ADDITIONAL PORTIONS OF RECORD

Comes now the appellee, Lois Rogers, by her attorneys, John Francis Connor, and Dougherty and Chandler, and M. J. Dougherty, and pursuant to Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit, files a designation of additional portions of the record which she thinks material.

DESIGNATION OF PARTS OF RECORD

Appellee believes that the additional parts of the record which she designated in the appellee's designation of additional portions of record on appeal

which she filed in the District Court of the United States for the District of Arizona are necessary for a consideration of the matter and appellee, therefore, adopts said designation.

Dated this 21st day of August, A. D. 1941.

JOHN FRANCIS CONNOR
DOUGHERTY and CHANDLER
By M. J. DOUGHERTY

Attorneys for Appellee.

Service of the within appellee's designation of additional portions of record is hereby acknowledged this 21st day of August, A. D. 1941.

ELLINWOOD and ROSS
By JOS. S. JENCKES JR.

.....
Attorneys for Appellant.

[Endorsed]: Filed Aug. 23, 1941. Paul P.
O'Brien, Clerk.

